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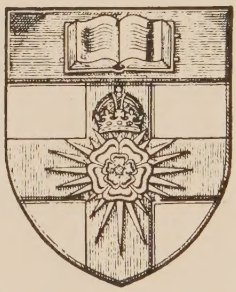

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1923.—VOL. I.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

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The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1923, will be as follows :—

In the First Series,

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In the Second Series,

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

C. A.
1922
July 14.

PARR *v.* SNELL AND OTHERS.

Practice—Judgment—Action against Joint Contractors—Claim of Damages for Breach—Final Judgment on Default of Defence against Two of Three Defendants—Bar to Proceedings against Third Defendant—Rules of Supreme Court, 1883—*Order XIII., r.* 6—*Order XIV.—Order XXVII., rr.* 2, 3, 4, 5, 6.

In an action against three joint contractors, for damages for breach of an agreement, the plaintiff obtained an interlocutory judgment for damages, to be assessed, against two of the defendants in default of defence. He then procured an assessment of damages and signed final judgment for the assessed amount against the two defendants who were in default :—

Held, that under the rule established in *King* v. *Hoare* (1844) 13 M. & W. 494 ; *Kendall* v. *Hamilton* (1879) 4 App. Cas. 504, and *Brinsmead* v. *Harrison* (1872) L. R. 6 C. P. 584 ; 7 C. P. 547, the plaintiff was precluded from proceeding with the action against the third defendant. There

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was no statute or rule of Court which took the case out of the law as laid down in those authorities.

Goldrei, Foucard & Son v. *Sinclair* [1918] 1 K. B. 180 distinguished.

Decision of Shearman J. reversed.

APPEAL by the defendant Quertier from the decision of Shearman J.

In November, 1919, the plaintiff Parr saw the following advertisement in the Daily Telegraph: "Secretary required in an established motor manufacturing company. Must invest 500*l*. Excellent opportunity for the right man. Commencing remuneration 350*l*. per ann. in addition to dividends on investment. Splendid prospects."

Having answered the advertisement he received a reply from the Kensington Light Car, Ld., and entered into negotiation with the defendants J. S. Snell, R. Saxon Snell, and D. N. Quertier who stated themselves to be directors of the company.

On January 8, 1920, the plaintiff wrote agreeing to accept the position of secretary to the company, and on January 17, the defendant J. S. Snell wrote to him confirming an arrangement whereby the plaintiff was to act as assistant secretary to the company for four weeks before becoming official secretary at 350*l*. a year, subject to his investing 500*l*. in the company. On February 1, 1920, an agreement was executed whereby the plaintiff was appointed secretary.

On February 9, shares in the company to the nominal value of 500*l*. were allotted to the plaintiff for which he paid by cheque, and the following undertaking in writing was given to him: "We J. S. Snell, R. Saxon Snell and D. N. Quertier hereby undertake and agree with G. C. Parr, Secretary of the Kensington Light Car, Ld., that upon his relinquishing his position as Secretary of the company the 500 ordinary shares of one pound each in the Kensington Light Car, Ld., held by G. C. Parr, Secretary to the Kensington Light Car, Ld., if he shall so desire, shall be purchased from him by a person, either appointed by us or through G. C. Parr, suitable to fulfil the position vacated by G. C. Parr, or by persons delegated by us, at a minimum rate of 1*l*. per share, or if the

market value of the shares be higher than 1*l.* per share, then shall such shares be purchased from G. C. Parr at their market value. Signed: J. S. Snell, R. Saxon Snell, D. N. Quertier."

The plaintiff having commenced his duties as secretary, discovered that the company was a fraudulent concern promoted by the defendants Snell and that no business was being done by it. The defendant Quertier had been entrapped in a similar manner, and induced to invest 500*l.* in shares upon being appointed mechanic at a salary of 250*l.* a year, and director at 100*l.* a year. Having charged the Snells with fraud he was dismissed and resigned his office of director. The plaintiff then brought this action against the Snells and Quertier claiming 500*l.* as the agreed purchase price of his shares in the company, or, in the alternative, 500*l.* damages for breach of the undertaking of February 9.

On May 4, 1921, the plaintiff signed interlocutory judgment against the two Snells, who had disappeared without putting in any defence, for damages to be assessed. The Master afterwards assessed them at 516*l.* 12*s.* 3*d.*, and final judgment was entered for this sum. The plaintiff then proceeded with the action against Quertier, who pleaded that he was not liable on the agreement as there was no consideration for his signing it, and contended that it was a joint, and not a joint and several agreement, and the plaintiff having recovered judgment against the Snells the cause of action against Quertier had been merged in the judgment and could not be prosecuted.

The plaintiff appeared in person.

Hawke K.C. and *B. L. A. O'Malley* for the defendant.

Shearman J. held that the undertaking of February 9 was joint and several, that the claim was for a liquidated sum, and that there was good consideration for the agreement between the plaintiff and Quertier. He therefore gave judgment for the plaintiff for 500*l.*

The defendant Quertier appealed.

Hawke K.C. and *W. Frampton* for the appellant. This is a joint contract. The learned judge was wrong in holding

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that it was joint and several. That being so the plaintiff, by signing final judgment against the two defendants, Snell, has lost his right of proceeding against the appellant. The learned judge also wrongly held that the claim was for a liquidated sum and not for damages and that therefore the case did not come within the rule established by *King* v. *Hoare* (1) and *Kendall* v. *Hamilton* (2)—namely, that where a final judgment has been taken against one or more of several joint contractors the plaintiff cannot proceed against the other or others. But it is said that there are special provisions in the Rules of Court which prevent the application of the above general rule. There is nothing in Order XXVII., rr. 2, 3, 4, 5, and 6; or in any other rule to take the case out of the established principle that there cannot be more than one judgment upon a joint liability. The point was referred to and considered but not decided in *Goldrei, Foucard & Son* v. *Sinclair*. (3)

Sir H. Cassie Holden for the respondent. There was a claim here for liquidated damages which is a liquidated demand within the rules. Under Order XXVII., r. 3, the plaintiff was entitled to enter final judgment against the defendants in default without prejudice to his right to proceed with the action against the other defendant: see also Order XIII., r. 6. There was no intention here on the part of the plaintiff to give up his right to go against the third defendant.

LORD STERNDALE M.R. I think this appeal must succeed. The point taken is that this was a joint contract; and being a joint contract, there has been a final judgment signed against two of the three joint contractors; and that it is not competent for the plaintiff, having obtained final judgment against two of the joint contractors, to proceed against the other. I cannot agree with the learned judge that this was a joint and several contract. I think it was a joint one; it is only necessary to read it in order to see that. It is not a matter that admits of much discussion; it entirely depends upon the conclusions

(1) 13 M. & W. 494. (2) 4 App. Cas. 504.
(3) [1918] 1 K. B. 180, 183, 188.

to be drawn from the language of the agreement. [His Lordship read the agreement and continued :] The learned judge expressed some doubt about it, but it seemed to him that it was a joint and several contract. It seems to me on the other hand, that it was clearly a joint, and not a joint and several contract.

The next thing to consider is what the plaintiff brought his action for. He sets out the agreement and the circumstances under which it was made ; and then he alleges his readiness and willingness to transfer the shares to the defendants or as they may direct ; and says : "the Defendants have failed to provide for the purchase of the said shares from him." Then in his prayer he makes two alternative claims : the first is for 500*l.*, the agreed purchase price of the said shares. He cannot however recover the purchase price of the shares without handing them over ; and he has recovered a judgment for 500*l.* without having handed over the shares or without having any obligation placed upon him to do so. The other alternative claim is for 500*l.* damages for breach of the said agreement ; that is a breach of an agreement to find a purchaser for the shares, or to purchase them themselves. It is quite clear that that is not necessarily a claim for the sum of 500*l.* at all. 500*l.* is the minimum price at which the shares were to be bought ; but it does not at all follow that the shares might not have been worth something—as a matter of fact I believe they were not, but they might have been—and in that case the damages to which the plaintiff would have been entitled would have been the difference between the 500*l.* which he was to get, and the value of the shares, which he was under no obligation to part with, because he did not get the 500*l.* That might very well be quite a different sum. Having those two alternative claims, he elected or decided upon which of them he was going to proceed, and he signed interlocutory judgment against the two Snells, who had made default in delivering any defence, upon the second alternative—namely, the claim for damages, because he signed an interlocutory judgment to recover against the defendants J. S. Snell and R. Saxon

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Snell damages to be assessed. He then proceeded with his action against the other defendant, and obtained a judgment for damages against him. In my opinion that claim upon which he proceeded, and on which he got these judgments, was not a claim for a liquidated sum, it was a claim for unliquidated damages. Before he proceeded against the present appellant and got this judgment for damages against him, he had obtained an assessment of the damages due under the interlocutory judgment against the Snells for 516*l.* 12*s.* 6*d.* I very strongly suspect that that assessment was obtained absolutely irregularly, by reason of the rule to which I am going to allude in a moment. I think the probability is that the gentleman who got the documents from the particular department of the office and then took them to the Master did not realize that there was any question about proceeding with the action against the appellant who had appeared, and against whom judgment had not been signed. I doubt if he ever thought about there being a defendant against whom judgment had not been signed; and I doubt whether the Master's attention was ever called to it. However, the Master proceeded to assess the damages; and then the plaintiff, having got the damages assessed, signed final judgment against the Snells for the amount so assessed; and the question is whether that is a bar to his proceeding against the appellant. Apart from any rules of Court or any statutory provisions to the contrary, it is quite clear that a judgment against one joint contractor or tortfeasor is a bar to proceeding against the others. It is not necessary to read the cases upon that point. It is clearly established in *Kendall* v. *Hamilton* (1); *King* v. *Hoare* (2); and *Brinsmead* v. *Harrison* (3) with regard to both joint contractors and joint tortfeasors. Therefore, apart from any special provision by statute or rule, it seems to me quite clear that this judgment is a bar to proceeding against the other defendant. There are a certain number of rules contained in Order XXVII. which have been framed to mitigate

(1) 4 App. Cas. 504. (2) 13 M. & W. 494.
(3) L. R. 6 C. P. 584; L. R. 7 C. P. 547.

the hardship occasioned by the application of the doctrine in *Kendall* v. *Hamilton* (1); *King* v. *Hoare* (2); and *Brinsmead* v. *Harrison* (3), and unless the plaintiff can bring himself within one of these rules, the general doctrine must apply. The learned judge seems to have thought that a dictum in a judgment of mine in *Goldrei, Foucard & Son* v. *Sinclair* (4) had something to do with the matter; but in my opinion it has nothing at all to do with it. We were there considering a totally different matter; and in any case I do not think the opinions expressed by myself and the other members of the Court in any way touch the matter that we have now to decide. I think Order XXVII., r. 5, is the only provision that affects this case at all; and that is to this effect: "When in any such action as in r. 4 mentioned"—that is for pecuniary damages only and some other alternative which does not concern this action—"there are several defendants, if one or more of them make default as mentioned in r. 2, the plaintiff may enter an interlocutory judgment against the defendant or defendants so making default, and proceed with his action against the others. And in such case, the value and amount of damages against the defendant making default shall be assessed at the same time with the trial of the action or issues therein against the other defendants, unless the Court or a judge shall otherwise direct." I think that the following note in the Yearly Practice, p. 362, is probably right: "If the action does not proceed to trial, or if for any other sufficient reason it is desirable to do so, a Master may on summons order the damages to be assessed by writ of inquiry or otherwise." I think that is right in two ways. It is right, as suggested, that the primary object of that provision for assessing at a different time was to provide for the case where the action did not proceed against the other defendant, but it certainly is applicable where there is any other sufficient reason, as the note says; and I believe the ordinary practice would be, under the second part of the

(1) 4 App. Cas. 504.
(2) 13 M. & W. 494.
(3) L. R. 6 C. P. 584; L. R. 7 C. P. 547.
(4) [1918] 1 K. B. 180.

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rule, which provides that the assessment may be at a different time if the Court or a judge shall so direct, to proceed by summons and ask him to direct a different time. It is because I see no reason to suppose that anything of the kind would have been done in this case that I think the assessment was probably irregular. As I say, probably the gentleman who took the documents to the Master had not observed the matter and never called the Master's attention to it; and the Master was never asked to direct a different time, but was simply asked to give an appointment to assess the damages, and, not having his attention drawn to the fact that there was still a defendant against whom judgment had not been given, he gave judgment in the ordinary course. What I want to point out in regard to that rule is that it clearly provides that an interlocutory judgment may be signed, and the action may still proceed against the other defendant, but in my opinion if the assessment was not made at the time of the trial against the other defendants, then obtaining assessment before would not of itself have been sufficient to bar the action against the other defendant. It is, I think, obvious from the provision that normally the damages against the defendant in default shall be assessed at the same time as the trial of the action against the other defendant, that the rule was not contemplating a final judgment against the defaulting defendant before the trial came on against the non-defaulting defendant; and there is no provision whatever in that rule, that if the plaintiff chooses not to stop at an interlocutory judgment plus an assessment, but to go on and add to both those things a final judgment, that is not to be a bar; therefore in my opinion the ordinary rule applies, that he is, by having obtained final judgment against the defaulting defendants, barred from proceeding against the other defendant.

It may be well to point out that in rr. 2 and 3, dealing with final judgment, there are express provisions that the plaintiff may sign final judgment and proceed against the other defendants. In r. 5 the only provision is that he may sign interlocutory judgment and go on; but there is nothing to

protect him against the operation of the ordinary law, if he does not stop at that, but proceeds to get a final judgment. Therefore I think by signing this judgment he has precluded himself from proceeding against the defendant against whom he afterwards obtained judgment. The appeal will be allowed and judgment entered for the defendant with costs here and below.

SCRUTTON L.J. I would content myself with concurring in what the Master of the Rolls has said, but as we are differing from the learned judge I think it is right to express my opinion. We are dealing with a settled system of law and are not entitled to mould or disregard it, because, as I think in this case, the rule is a technical one which does not in any way affect the merits of the particular case. The technical rule of law which we have to apply is this: that where there are joint contractors if judgment is signed against one the other is discharged. I have recently had occasion to deal with that rule in *Moore* v. *Flanagan* (1), where I said, and I think rightly, that the basis of the rule is, as stated by Vaughan Williams J. in *Hammond* v. *Schofield* (2): "The basis of this defence is not the election or unconscious election, if there can be such a thing, of the plaintiff, but the right of the co-contractor when sued in a second action on the same contract to insist, though not a party to the first action, on the rule that there shall not be more than one judgment on one entire contract." I then went on to say (3): "Another technical way of putting it is to say that the contract is merged in the judgment, and therefore the cause of action on the contract is gone. A more substantial way of putting the matter is that each joint contractor has a right to have his co-contractors joined as parties so as to have them all before the Court."

The first question here is: is this a joint contract? Because, if it is not, the technical rule does not apply. With great deference to the learned judge, it seems to me reasonably clear that this is a joint contract. The two Snells and Quertier

(1) [1920] 1 K. B. 919, 925. (2) [1891] 1 Q. B. 457.
(3) [1920] 1 K. B. 925.

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agree that if the secretary relinquishes his position his shares shall be purchased from him by a person either appointed by them, or by persons delegated by them. That seems to me to be a contract to find a purchaser approved by the three, and to be clearly a joint and not a several contract. That being so, in this case judgment has been signed against two and the third is discharged under the technical rule in *Kendall* v. *Hamilton* (1), unless there is some rule or statute which prevents the operation of the old rule. There is a set of orders and rules; namely, Order XIII., judgment signed in default of appearance; Order XIV., judgment signed on specially indorsed writ; Order XXVII., judgment signed on default of pleading. In Order XIII. and in Order XXVII., if it is a case of a debt or liquidated demand, judgment may be signed against one for default of appearance or default of pleading, and yet the plaintiff may go on and sign judgment against the others. The same applies to Order XIV., where the action can only be brought for debt or liquidated demand: so for any debt or liquidated demand the old rule has been done away with by the rules under the Judicature Act. I think there is no doubt that this is not a liquidated demand. When you come to actions which are not for debt or liquidated demand, but are for damages or unliquidated demands, you find the wording of the rule is altered. You are allowed, in the case of default of appearance, or default of pleading, to sign an interlocutory judgment and proceed against the other defendant and to assess damages: but there is nothing to allow you to sign final judgment against some of the defendants, and yet go on against the others or other. That means, in my view, that the old rule of *Kendall* v. *Hamilton* (1) still survives as to that class of case. What has happened in this case is, I suspect, quite irregular. An interlocutory judgment has been regularly signed. The result of that is that the damages should be assessed at the trial of the action against the third contractor, as they might be, but the rule says "unless otherwise ordered." No order otherwise is produced to us, but in fact the Master has

(1) 4 App. Cas. 504.

assessed damages, and I strongly suspect he was asked to give an appointment without it occurring to anyone that he should have had a summons and made an order on it; but he has assessed damages and then, instead of entering a separate final judgment, that has been done which is provided for by the regular practice, the amount assessed has been entered up in the interlocutory judgment, which is then converted into a final judgment. The effect of that appears to me to be, following the old technical rule to which I have referred, that the remedy against the third contractor has been destroyed by judgment being obtained against the first two, it being impossible to have two final judgments on the same contract. For these reasons, which I agree are technical, I think the appeal must be allowed, with the consequences indicated by the Master of the Rolls.

YOUNGER L.J. I am entirely of the same opinion.

Appeal allowed.

Solicitors: *Elvy Robb and Welch; Joynson-Hicks, Hunt, Cardew and McDonald.*

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[IN THE COURT OF APPEAL.]

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Agricultural Holding—Breach by Tenant of Covenants in Lease—Claim by Landlord for Compensation—Delivery of Particulars of Claim—Sufficiency of Particulars—Agriculture Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 76), *s.* 18, *sub-s.* 2.

By s. 18, sub-s. 1, of the Agriculture Act, 1920, any difference arising out of a claim by the landlord of an agricultural holding against his tenant for breaches of the covenants in the lease is to be determined by arbitration, and by sub-s. 2, "Any such claim as is mentioned in this section shall cease to be enforceable after the expiration of two months from the termination of the tenancy unless particulars thereof have been given by the landlord to the tenant . . . . before the expiration of that period":—

Held, by Bankes and Warrington L.JJ.; Atkin L.J. dissenting, that, having regard to the severity of the penalty attached to non-compliance—namely, total extinguishment of the claim—the presumption was that the requirement of "particulars" was not intended to be construed strictly, and that, for the purpose of keeping the claim alive and enabling the parties to get before the arbitrator, a less degree of particularity was required to satisfy the section than would be required of particulars of a statement of claim in an action, notwithstanding that when the parties get before the arbitrator he might be of opinion that the particulars were insufficient, and might order further and better particulars to be given.

Appeal from the county court judge of Carmarthen on a case stated by an arbitrator under the Agricultural Holdings Acts.

Under an indenture of lease made in March, 1900, Enoch Jones became tenant to Lewis Lewis Evans of Mock Farm as tenant from year to year. The lease contained covenants by the tenant to keep the premises in good tenantable condition and repair, to cultivate the land in a good and husbandlike manner according to the custom of the country, and to keep the hedges properly clipped and grub the hedgerows when necessary. In March, 1921, the landlord gave the tenant notice to quit, which notice expired on September 29, 1921. On September 28 the landlord served notice on the tenant of his intention to claim compensation "for dilapidations and neglect of buildings, fences, fixtures, and for the deterioration generally of the holding at Mock Farm" in breach of the covenants in the lease. By s. 18, sub-s. 1, of the Agriculture

Act, 1920: "Any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under the Act of 1908 or for any sums claimed to be due to the tenant from the landlord for any breach of contract or otherwise in respect of the holding, or out of any claim by the landlord against the tenant for waste wrongly committed or permitted by the tenant, or for any breach of contract or otherwise in respect of the holding, and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding or arising, whether during the tenancy or on the termination thereof, as to the construction of the contract of tenancy shall be determined by arbitration under the Act of 1908." By sub-s. 2: "Any such claim as is mentioned in this section shall cease to be enforceable after the expiration of two months from the termination of the tenancy unless particulars thereof have been given by the landlord to the tenant or by the tenant to the landlord, as the case may be, before the expiration of that period." The two months after the expiration of Jones' tenancy of Mock Farm expired on November 29. On November 28 the landlord served a further notice on the tenant in the following terms: "We hereby pursuant to the notice in that behalf served on you on or about the 28th of September last give you further notice that he the said Lewis Lewis Evans intends to claim from you in respect of Mock Farm . . . . compensation of damages under (inter alia) the following heads:—

1. "For neglect or failure to keep the dwelling house, cowhouse, stable, pigstyes, cattle shed, the loft of the old house, and the premises generally in substantial repair;

2. For failure to keep open the air entrance and to maintain the ventilation under the parlour floor;

3. For failure to keep the hedges or fences, and the wire fencing thereon, and the gateway corners and six gates in substantial repair;

4. For failure to keep open the ditches and the mouths of the drains generally;

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5. For cutting thorns in the hedgerows out of season, and failure to grub such hedgerows and to raise the hedges thereunder after cutting;

6. For failure to cultivate the said farm and lands in a good husbandlike manner according to the custom of the country;

7. For manurial value of corn, straw, hay, and roots taken away during last winter and spring for consumption at Llwynderw, Llangerer, and other places.

8. For during last year mowing Three Acre Field of pasture land more than usual;

9. For neglect to clean and properly manure land before sowing grass seeds therein;

10. For leaving a part of the Green Crops Field to remain uncultivated and to grow wild;

11. For deterioration of the holding generally for want of proper cultivation;

12. For neglect to maintain in substantial repair the private occupation roadway leading from the homestead to the old Hayfield; and

13. For failure to pay and discharge the tithe rentcharge in respect of the said premises from the year 1912 to Michaelmas, 1921."

On February 1, 1922, an arbitrator was appointed by the parties to determine the said claim. At the hearing before the arbitrator it was contended by the tenant that the notice of November 28 did not give sufficient "particulars" to satisfy the requirements of s. 18, sub-s. 2, of the Act of 1920, and that the landlord's claim, if any, had in consequence ceased to be enforceable. The arbitrator stated a case, setting out the above facts, for the opinion of the county court judge, in which he asked the question whether the notice contained sufficient particulars. The county court judge held that it did.

The tenant appealed.

Neilson K.C. and *W. Allen* for the appellant. The object of requiring the delivery of particulars of the claim is to let the tenant know precisely what it is alleged that he ought

to have done, and so to obviate the expense of going to arbitration in respect of items which he would be willing to admit. The particulars in this case do not give the necessary information. For instance in No. 1 the complaint of failure to keep the dwelling house in repair does not indicate whether the disrepair is in the walls, roof or floors. No. 3 does not state which fences are out of repair, or to what extent. No. 6 merely alleges a breach of the covenant to cultivate the land in a husbandlike manner according to the custom of the country. It gives no particulars at all. It does not say which fields are badly cultivated, or in what respects the custom has been broken. Moreover the particulars ought to specify the estimated amounts which would be required to put the different items in a proper state of repair.

Hanbury Aggs for the respondent. Having regard to the severity of the penalty attached to noncompliance with the requirement of s. 18, sub-s. 2, of the Act of 1920, as to delivery of particulars of claim, the Court will be disinclined to construe the provision strictly. It is not like the corresponding penalty for noncompliance with an interlocutory order in a High Court action, for there the plaintiff, if his action is struck out, can begin again; whereas here the remedy is absolutely barred after the expiry of the two months. It is enough to satisfy the sub-section if the particulars are in the first instance sufficient to put the tenant on inquiry as to the nature of the claim that is going to be made against him. If the arbitrator on the parties coming before him thinks that further and better particulars ought to be given he has power to order them under Sch. II., para. 7, of the Agricultural Holdings Act, 1908. But in the first instance a comparatively small degree of particularity is enough. The question in each case is whether the person against whom the claim is made was likely to be misled. That no great degree of precision is required is indicated by the fact that the particulars need no longer be in writing. Under the Agricultural Holdings Act, 1883, s. 7, a tenant claiming compensation for improvements had to give notice of his intention to make such claim in writing, and "every such notice" was required to state the "particulars

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and amount of the intended claim." Under that Act therefore the particulars had to be in writing; and there was a similar provision under the Act of 1908 in the case of compensation for damage by game: s. 10, sub-s. 2; but in s. 11 of that Act, which dealt with compensation for disturbance, though by proviso (*b*) the notice of intention to claim compensation had to be in writing, the actual claim itself, including the particulars, need not: *Sylvester* v. *Brown.* (1) And s. 10 of the Act of 1920, which has taken the place of s. 11 of the Act of 1908, is in similar terms. The notice of intention to claim must be in writing, but the claim itself may be made orally, and it is the latter that the particulars required by s. 18, sub-s. 2, have to accompany. Therefore the particulars may be given orally. The particulars are not required to specify the cost of the several items. Under s. 7 of the Act of 1883 they had to do so. But there is no such provision in the Act of 1920. It is only the arbitrator who is now required to specify the amounts: see s. 20, sub-s. 2, which provides that "On an arbitration under the Act of 1908 the arbitrator (*a*) shall state separately in his award the amounts awarded in respect of the several claims referred to him." But until you reach the award the Act is silent as to amounts.

Neilson K.C. in reply.

BANKES L.J. This appeal raises an important question upon which the Court should be careful not to lay down any rule which might in practice cause injustice. The section which we have to construe is one which deals with claims both by tenants against landlords and by landlords against tenants. Sub-s. 1 begins by dealing with "any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under the Act of 1908," and when we turn to that Act we find that there are several different classes of claims that a tenant may make against his landlord. Then the sub-section goes on "or for any sums claimed to be due to the tenant from the landlord for any breach of contract or otherwise in respect of the holding,

(1) (1916) 85 L. J. (K. B.) 1173.

or out of any claim by the landlord against the tenant for waste wrongly committed or permitted by the tenant or for any breach of contract or otherwise in respect of the holding, and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding, or arising, whether during the tenancy or on the termination thereof, as to the construction of the contract of tenancy shall be determined by arbitration under the Act of 1908." Now it would be difficult to select more general words to describe the classes of disputes which are intended to be covered by the section. Then sub-s. 2 provides that "any such claim as is mentioned in this section shall cease to be enforceable after the expiration of two months from the termination of the tenancy unless particulars thereof have been given by the landlord to the tenant or by the tenant to the landlord, as the case may be, before the expiration of that period." The first thing to which I desire to draw attention in that sub-section is that it seems to me that the Legislature must have intentionally omitted a requirement that the particulars should be in writing, and to my mind that indicates the kind of information that the Legislature contemplated as proper to be given between the parties for whom it was legislating. I think it must have been within the contemplation of the Legislature that the kinds of dispute to which the section relates would in many cases arise between men who did not engage legal advisers, but who employed to assist them tenant farmers, agents, or valuers—persons who were very competent to deal with cases of this description, though not trained to draft formal legal documents. Again the section does not use the word "full" particulars, or "detailed" particulars. It seems to me that the Legislature has deliberately adopted language which leaves the question of how much information is to be given entirely at large. It had in sub-s. 1 indicated in the most general terms the classes of claims and disputes that might arise, and it seems to me that the object of sub-s. 2 was that information should be given as to the general nature of the particular claim, and that such information is sufficient

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to satisfy the sub-section. A greater degree of particularity was I think not required, for it must be borne in mind that a failure to comply with the provisions of the sub-section involves a barring of the claim. With these considerations in view I approach the particular case. I do not hold up this document as one to be copied, but I cannot say that it does not give particulars of the landlord's claim within the meaning of the sub-section. It may be that they are so general that the arbitrator in the exercise of his discretion may require further information to be given, but that in my opinion is not enough to deprive the document of its character of "particulars." Particulars may be scanty and require to be amplified, but they still remain particulars provided they contain information as to the nature of the claim as distinguished from the class of claim. Take for instance the first item in the document: "For neglect or failure to keep the dwelling house, cowhouse, stable, pigstyes, cattle shed, the loft of the old house, and the premises generally in substantial repair." The class of claim there is damages for breach of the covenant to repair. The particulars given specify the nature of claim, in that they indicate the particular buildings which are the subject of the breach. And so on through the various items; some of them are more general than others, but taking the document as a whole I am unable to say that it does not give particulars of the claim sufficiently to prevent that claim from being barred. With regard to Mr. Neilson's contention that the particulars ought to specify the estimated cost of the different items of repair required, though I am not prepared to attempt any definition of "particulars," I do not think that the statute contemplated anything in the nature of a priced schedule of dilapidations.

The answer to the question put by the arbitrator was in my opinion correctly answered by the learned judge and the appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. The question arises under the Agriculture Act, 1920, an Act intended

to provide, amongst other things, means for settling by arbitration various questions between landlords and tenants. The point which we have to decide is whether a certain document specifying the claim of the landlord against the tenant for compensation amounts to "particulars" within s. 18, sub-s. 2. I agree that the question is one of very considerable importance, and having regard to the severity of the penalty which is imposed upon either landlord or tenant, as the case may be, if the particulars should be held insufficient, I think it would be disastrous if we were to lay down a strict and narrow rule in accordance with which the particulars must be prepared. The penalty imposed is that if the particulars specified in the section are not given within two months after the termination of the tenancy the claim shall cease to be enforceable. Another thing which strikes me very forcibly in sub-s. 2, and which I think materially affects the construction of the section, is that the particulars need not be given in writing. Take the case of a claim by a tenant against the landlord, the tenant telling the landlord's agent by word of mouth what his claims are. Can it be expected that he would give to that person those details which might be required if further and better particulars, with items and dates, were demanded in an action? Then dealing with the question of construction I consider first how the claims are described in sub-s. 1, and I find that they are described in the most general terms, and that a claim made in those terms would give no information to the person against whom the claim was made as to even the heads under which it was put forward. They are described in the case of the tenant as first, "compensation payable under the Act of 1908," a general head which includes improvements, damage by game, and disturbance. Then the next matter stated in the sub-section is "for any sums claimed to be due to the tenant from the landlord for any breach of contract or otherwise in respect of the holding." That again is stated with the utmost generality. And when we come to the claims of the landlord against the tenant we find that they are equally general. Having regard to the generality of the

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claims so stated in sub-s. 1 what interpretation are we to put on the "particulars" of the claims required by sub-s. 2? What is required is not "full and detailed particulars with items and dates" or anything of that sort; it is simply particulars of an exceedingly general claim. In my judgment when you get this collocation of the general description of the claim, and then a reference in vague terms to particulars of the claim, it is in general sufficient if the document or the conversation which contains the particulars gives an indication to the landlord or the tenant, as the case may be, of the particular kind of claim which is going to be made in order that he may have an opportunity of himself examining the subject matter and seeing what evidence he will have to adduce, or what information he will have to give the arbitrator.

I now turn to the document which has been prepared to see whether it gives particulars of the kind referred to in sub-s. 2. The first thing to do is to compare its language within the general description in sub-s. 1, and in view of that comparison I think the document is sufficient to satisfy the section. For instance sub-s. 1 speaks of "any breach of contract or otherwise in respect of the holding." With regard to that the document informs the tenant which of the covenants are alleged to have been broken, and it tells him generally in what respects they have been broken. The first three clauses relate to breaches of the covenants to repair. Clause 1 specifies the buildings which are out of repair, while clauses 2 and 3 refer to other respects in which the tenant has failed to repair the premises. Clauses 4 and 5 refer to breaches of other specific covenants relating to drains and fences. Clause 6 alleges a breach of the covenant to cultivate the land in a good husbandlike manner according to the custom of the country. Clauses 7–10 condescend to particular respects in which the land has been improperly cultivated, while clause 12 charges a breach of a covenant to repair a particular road. In my opinion when one comes to look at sub-s. 1 and then at the terms of the document one can hardly avoid the conclusion that the county court

judge was right in holding that the landlord had furnished particulars within the meaning of sub-s. 2, though it may be that when the arbitrator comes to take evidence in support of the claims he may require the landlord to specify them in greater detail.

ATKIN L.J. I agree with my brothers in thinking that this case raises a question of great importance to the agricultural community, but I disagree with the results at which they have arrived. For myself I think that the effect of this judgment will be to take away the protection which s. 18, sub-s. 2, was intended to afford, for it appears to me that you might just as well wipe out the provision with regard to particulars altogether as hold that the particulars given in this case were sufficient to comply with the requirements of the section. I agree that it is important, because it relates to claims by tenants as well as to claims by landlords, but personally I should have thought that in the majority of cases both tenants and landlords are advised upon the particulars of their claims by the professional valuers who will have later on to adjust the differences, or by solicitors. While I agree that it is not necessary to put a narrow meaning upon the Act, I think on the other hand that it is not desirable to give it a nebulous meaning ; I think one can steer a course between the two. The section provides that any claim by a landlord for compensation for breach of covenant shall be determined by arbitration, and that the claim shall cease to be enforceable after the expiration of two months from the termination of the tenancy, unless particulars thereof have been given before the expiration of that period. Now here is a claim by a landlord on a contract of tenancy which contains the usual covenant that the tenant shall keep the premises in good repair. The landlord, who had already given notice before the termination of the tenancy that he intended to claim compensation for dilapidations and general deterioration of the holding, on the last day of the two months gave a further notice that he made his claim under certain heads, the first of which was " For neglect or failure

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to keep the dwelling house, cowhouse, stable, pigstyes, cattle shed, the loft of the old house, and the premises generally in substantial repair"—that is to say, that he was claiming under that head for breach of the contract to keep the premises in repair. That appears to me to be a mere statement of the general claim; it does not give any particulars of that claim. It does not specify in what respect the several buildings are out of repair, or to what extent; it does not suggest whether the restoration would cost 5*l.* or 500*l.* I cannot think that a vague statement of that kind was what was contemplated when it was provided that particulars of the claim should be given. I then turn to another head: "For failure to cultivate the said farm and lands in a good and husbandlike manner according to the custom of the country." But that gives no particulars of the claim; it does not give the tenant any information as to the respects in which it is alleged that he has failed to cultivate in accordance with good husbandry. To my mind the object of particulars is to enable the tenant to acquaint himself with the facts necessary to meet the claim, and particularly to make up his mind whether it is worth his while to dispute it at all. I do not say that it is in all cases necessary to quantify the claim, because in many cases the mere statement of the precise repair required will be sufficient of itself to give the tenant a rough idea of what it would cost to do the work, whether, that is to say, it would be a matter of a few pounds or would be likely to run into hundreds. But until he knows what the precise thing is that is required he has not the materials upon which to decide whether anything is to be gained by disputing the claim and going to arbitration. With great respect I entirely disagree with what has been said as to the term "particulars" being intended to indicate the nature of the claim as distinguished from the class of claim. Indeed I am not quite sure that I understand the distinction between the two. I think that the particulars should tell the tenant what is the work that is required to be done with sufficient precision to enable him to form his own estimate of the probable cost of doing it.

The result of the decision of the majority of the Court in this case is that all these particulars are held to be sufficient, and it seems to me that it is no protection to say that they are not to be adopted as a precedent, for as they are now held to be legal and it would obviously be a great saving of trouble and expense to the parties to follow them, it is perfectly certain that in practice they will be regarded as a precedent to be followed. There is one other matter to which I desire to call attention. The county court judge, whose judgment is now held to be correct, said this: "I have (but not without doubt) come to the conclusion that the second notice, viz., of November 28, does contain particulars of the claim. I do not say that they are full particulars, but I am not prepared to find that they are not particulars within the meaning of s. 18. If the particulars were not sufficient the arbitrator would see that proper particulars were supplied and adjourn the arbitration if he thought it necessary to do so in the interests of justice, and he could make the party in default pay the costs occasioned by the adjournment." So the learned judge was prepared to find that these particulars were not full particulars, that they were not sufficient particulars, that they were not proper particulars, and that the party who gave them was a party in default. Nevertheless, though they apparently deserved all that adverse comment, he regarded them as complying with the section, and he has now been upheld by this Court in so doing. I am sorry to say that I cannot agree with that view. I think that in the case of those heads to which I have specially referred the particulars were clearly insufficient. I do not say that all the particulars are wrong. Some of them might have gone before the arbitrator, but others of them are in my opinion clearly wrong. I think the appeal should be allowed.

BANKES L.J. I want to make it quite plain that my judgment was intended to answer the question asked by the arbitrator, which was: "Did the notice served contain sufficient particulars to satisfy the requirements of s. 18?"

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I did not understand that any question was asked as to each particular item, but whether the document as a whole gave the landlord the right to go before the arbitrator.

WARRINGTON L.J. That was also my understanding.

Appeal dismissed.

Solicitors for the appellant: *Ellis & Fairbairn.*

Solicitor for the respondent: *J. Wilmer Hives, for Evans, Thomas & Jones, Llandyssul.*

J. F. C.

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THE KING *v.* GODFREY.

Extradition—False Pretences—Constructive Presence in Foreign State when committing Crime charged—Arrest in England—"Fugitive criminal"—Extradition Act, 1870 (33 *&* 34 *Vict. c.* 52), *s.* 26.

By s. 26 of the Extradition Act, 1870, a fugitive criminal is defined as "any person accused . . . . of an extradition crime . . . . who is in" this country.

The applicant was charged with obtaining goods by false pretences in Switzerland, the false pretences being alleged to be made in that country by a partner at the procuration in this country of the applicant. The latter was not physically in Switzerland at the time when the pretences were made nor had he been there since. He was arrested in England:—

Held, that he was a "fugitive criminal" within the meaning of the above section, and, accordingly, that he could be extradited.

APPLICATION for a writ of habeas corpus.

The applicant, Sydney Godfrey, a silk merchant, was alleged to be a member of a firm known as Jean S. Aron & Co., carrying on business in this country. It was further alleged that members of the firm, other than the applicant, had while in Switzerland made certain false pretences to persons in Switzerland and had thereby obtained goods from those persons which had been disposed of in this country, and it was contended that the applicant was an accessory before the fact to the offence, which was a misdemeanour, and therefore liable as a principal, although in fact he was not in

Switzerland at the time when the alleged false pretences were made or at any time since.

On September 13, 1922, the applicant was committed at Bow Street Police Court for extradition to Switzerland on the above charge. It being vacation time, application was made in chambers for a writ of habeas corpus and Romer J., the vacation judge, on September 26, adjourned the application to the High Court.

In addition to the contention that the applicant was not a "fugitive criminal" within the Extradition Act, 1870 (33 & 34 Vict. c. 52), it was contended that there was no evidence of the offence charged upon which the magistrate could commit the applicant for extradition. The Court held that there was evidence, and the argument on that point is not reported.

Sir E. Pollock A.-G., *Giveen* and *Roland Oliver* showed cause. Assuming, although he had never been there, that the offence charged was committed by the applicant in Switzerland, then he is a "fugitive criminal" within the meaning of s. 26 of the Extradition Act, 1870. (1) If the applicant is seeking to avoid trial in Switzerland by keeping in this country, of which there is evidence, he is a fugitive criminal within the meaning of s. 26, although in fact he has not fled hither from Switzerland. *Reg.* v. *Nillins* (2) governs this case.

[*Reg.* v. *Jacobi and Hiller* (3) was also referred to.]

Whiteley K.C., *Keeves* and *Erskine Harper* in support. The applicant is not a fugitive criminal within the meaning of s. 26 of the Act of 1870. (1) *Reg.* v. *Wilson* (4) shows that the treaty with Switzerland, signed on November 26, 1880, must be taken to be incorporated with and to limit the

(1) Extradition Act, 1870, s. 26: "The term 'fugitive criminal' means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is in or is suspected of being in some part of [His] Majesty's dominions; and the term 'fugitive criminal of a foreign state' means a fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that state."

(2) (1884) 53 L. J. (M. C.) 157.

(3) (1881) 46 L. T. 595 (note).

(4) (1877) 3 Q. B. D. 42.

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operation of the Act. By the first part of art. 1 of the treaty each party engages to deliver up to the other party specified criminals (with the exception next noted) "who . . . . shall be found within the territory of the other." By the second part the Swiss Government, who had excepted Swiss nationals from their engagement in the first part to deliver up criminals, undertake to try them in Switzerland being persons "who . . . . should have taken refuge in Switzerland." All the "persons" referred to in the article are alleged criminals who are in a country other than that in which their crime was committed, and the second part shows that they must have "taken refuge" there, that is, fled thither from the other country. *Reg.* v. *Nillins* (1) was wrongly decided, and is adversely criticised in Sir Edward Clarke's work on Extradition, 3rd ed., p. 225. In an American case—*State* v. *Hall* (2)—the headnote is: "A person cannot, in any sense, be deemed to have fled from the justice of a state in the domain of whose terminal jurisdiction he has never been corporally present since the commission of a crime therein. One who has never fled cannot be a fugitive from the justice of a state in which he is only constructively present at the time he commits a crime." The applicant was only constructively present in Switzerland when the alleged false pretences were made.

[LORD HEWART C.J. But in that case there was no statutory definition of "fugitive from justice." (3)]

LORD HEWART C.J. This is an application for a writ of habeas corpus. On September 13 last the applicant, Sydney Godfrey, who describes himself as a silk merchant, was committed at Bow Street Police Court to be surrendered in

(1) 53 L. J. (M. C.) 157.

(2) [1894] 44 Am. St. Rep. 501.

(3) At the conclusion of the case Mr. Whiteley pointed out that by Article 4, s. 2, cl. 2 of the Constitution of the United States: "A person charged in any state with . . . . crime, who shall flee from justice, and be found in another state, shall, on demand . . . . of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." See p. 505 of the report of the case in 44 Am. St. Rep. 501.

pursuance of the Extradition Act, to take his trial in Switzerland on a charge of obtaining goods by false pretences. He now asks for a writ of habeas corpus which, if granted, would have the effect of defeating the warrant of extradition. The writ is sought on two grounds. First it is said that there was no evidence before the magistrate to support the charge. The question for us is not as to the weight of the evidence, but only whether there was evidence, and, speaking for myself, I think there was. The second and more substantial point is that this applicant is not a "fugitive criminal" within the meaning of the Extradition Act, 1870, when that statute is read side by side with the treaty between this country and Switzerland. Now in order to see what exactly is the force of that submission it is necessary to look at the definition of "fugitive criminal" in s. 26 of the Act. [His Lordship read it. (1)] For my own part I cannot help thinking that some confusion has arisen from the use of the word "fugitive." At the first blush it might appear that when a man is spoken of as a fugitive what is meant is that he has fled from one country to another country. But is that notion in the least degree necessary? Suppose that a person had gone to another country, and, because he had committed a crime there, had fled to this country. He would in that case be fleeing from the consequences in that other country of what he had done there, and he would clearly be a fugitive criminal. But it seems to me that those words are equally satisfied whether the man has physically been present in that other country or not, if he committed the crime there. In the one case as in the other he is seeking to escape the penal consequences of his act.

The point has been considered in more than one case. To some extent it arose in the cases of *Reg.* v. *Jacobi and Hiller* (2) and *Reg.* v. *Nillins* (3), and it is to be observed that in the latter case A. L. Smith J., as he then was, in expressing entire agreement with the judgment of Cave J. said (4): "If there were no definition clause, the question would admit

(1) Ante p. 25 (note).
(2) 46 L. T. 595 (note).
(3) 53 L. J. (M. C.) 157.
(4) Ibid. 159.

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of some argument;"—that is not expressing a very high opinion of the point even where there is no definition clause —"but s. 26 [of the Extradition Act, 1870] seems to me to put the matter beyond all doubt. The words are 'who is in' this country, not, as the argument in support of the rule would make them be 'who has fled to this country.'" And what had been said by Cave J. was (1): "It is clear, then, that the crime was committed in a foreign state. But against this it is urged, that to come within the definition he must have fled from that state to some part of her Majesty's dominions, but there is nothing of that in the section. The words are, 'who is in or is suspected of being in some part of her Majesty's dominions,' and I cannot give these words other than their plain meaning." During the argument attention was drawn to an American case of *State* v. *Hall* (2) with regard to which two things are to be observed. In the first place the case of *Reg.* v. *Nillins* (3) was not referred to, and secondly, ex concessis there was no such definition in American law of fugitive criminal as that which places a stumbling block in the way of the applicant here.

But it is said that the definition in the Act of 1870 must, for the purpose of this case, be considered with the relevant passages in the treaty with Switzerland. Be it so. I cannot help thinking, upon looking at those passages, that the interpretation of the definition of fugitive criminal given in *Reg.* v. *Nillins* (3) is thereby confirmed. Art. 1 reiterates in effect the expression in s. 26 of the Act "who is in" by the words "who . . . . shall be found within" and that places our Government under the obligation of delivering up all persons charged with or convicted of certain crimes if they are found in this country. But so far as the Swiss Federal Council are concerned an exception is made, for they deliver up all persons except those of Swiss nationality, and that exception is dealt with in the latter part of art. 1. Mr. Whiteley's argument in support of the application is, that because art. 1 in dealing with the precise exception employs the expression "should

(1) 53 L. J. (M. C.) 158. (2) 44 Amer. St. Rep. 501.
(3) 53 L. J. (M. C.) 157.

have taken refuge in Switzerland" it follows that the words "should have taken refuge" ought to be read into the first part of the article and be treated as limiting the application of the Act of 1870 so as to cut down the definition. It seems to me that there are at least two answers to that argument. First, that the words used in the first part of the article are "shall be found within," and, secondly, that even if the words are to be read as "shall have taken refuge in" the argument would still fail because that from which refuge is taken is not the foreign country but the penal consequences of a criminal act. It does not seem to me to be necessary to the idea of fugitiveness, if I may use the word, that the alleged criminal should have been resident in the country where the crime was committed. I do not differ in the smallest degree from the decision in *Reg.* v. *Nillins.* (1) The application is therefore dismissed.

AVORY J. I am of the same opinion. The point is taken that the applicant cannot be described as a fugitive criminal within the meaning of the Extradition Act, 1870. I think that Act should be read in conjunction with the treaty. Now it is clear that art. 1 of that treaty gives no colour to the contention that the applicant is not a fugitive criminal within the Act, because under its provisions this country undertakes to give up any person who has committed crime in Switzerland "who is found within" the territory of this country. Mr. Whiteley for the applicant contends that the second half of the article supports his contention. But that part of the article has no application to anybody but Swiss subjects, and was added in consequence of the reservation in the first part providing that Switzerland will not give up Swiss subjects to be tried in this country. It is a kind of compensatory provision. With regard to the American case of *State* v. *Hall* (2) I see no reason to disagree with it. Prima facie a man is not described as a fugitive unless fleeing from something, and therefore prima facie the word would be understood to mean one fleeing from some other country. But

(1) 53 L. J. (M. C.) 157. (2) 44 Amer. St. Rep. 501.

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the definition of "fugitive criminal" in s. 26 of the Act of 1870 puts the matter beyond doubt, because it defines him as any person accused of an extradition crime committed within the jurisdiction of a foreign State "who is in" [His] Majesty's dominions. It is to be observed that a distinction is drawn in that definition between a "fugitive criminal" and a "fugitive criminal of a foreign state." Whereas "fugitive criminal" means any person—not any fugitive person—accused of an extradition crime committed in any foreign state and who is in this country, a "fugitive criminal of a foreign state" means a "fugitive" criminal so accused. That distinction being drawn seems to make it impossible to uphold the contention that fugitive criminal necessarily means a person who has fled from a foreign state. I think we are bound by *Reg.* v. *Nillins* (1), but in any case I am prepared to follow it notwithstanding the criticism to which it has been subjected.

SANKEY J. On the second point Mr. Whiteley invites us to reconsider *Reg.* v. *Nillins* (1), decided as far back as 1884. I think we are bound by that decision, and moreover, in my view it is correct. The question turns on the meaning of "fugitive criminal," and whatever might be the meaning of those words if no definition of them existed, as far as English law is concerned they have been defined by s. 26 of the Extradition Act, 1870. As Smith J. pointed out in *Reg.* v. *Nillins* (2) the words in s. 26 are "who is in" this country not "who has fled to this country." Avory J. has pointed out that the term fugitive criminal does not mean any fugitive person accused who is in any part of His Majesty's dominions. The word "fugitive" is not inserted before "person" but is inserted before "criminal" in the latter part of the definition. In the first part therefore it means any person accused. If, as was said by an eminent writer as far back as 1888 (3), the decision in *Reg.* v. *Nillins* (1) may lead to serious difficulties, that result must be avoided

(1) 53 L. J. (M. C.) 157.
(2) 53 L. J. (M. C.) 157, 159.
(3) Sir E. Clarke on Extradition, 3rd ed., p. 225.

by an amendment of the law rather than by a departure from a decision which has stood for nearly forty years, and which appears to me to be right.

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Application dismissed.

Solicitor showing cause: *The Treasury Solicitor.*
Solicitors in support: *S. Myers & Son.*

W. L. L. B.

TRANSOCEANICA SOCIETA ITALIANA DI NAVIGAZIONE *v.* H. S. SHIPTON & SONS.

1922 *Feb.* 2, 3.

[1921. T. 1588.]

Shipping—Charterparty—Cargo—Receiver's obligation to Shipowners—Implied Warranty that Cargo would not cause delay in Discharge—Delay caused by defective Condition of Cargo.

A steamship belonging to the plaintiffs was chartered to carry a full and complete cargo of lawful merchandise at the option of the berth charterers from Alexandria to London, and she was to be discharged as fast as she could deliver in accordance with the custom of the port. The charterparty provided for demurrage at the rate of 250*l.* per running day. About 500 tons of barley was loaded on board as part of the general cargo, and the defendants were the indorsees of the bill of lading in respect of 300 tons. That bill of lading stated that the barley was shipped in good order and condition, and that the cargo was to be received by the consignees as fast as the steamer could deliver in accordance with the custom of the port. All unloading at the Port of London is done under statutory authority by the Port of London Authority who provide the necessary machinery and employ all the men. The work done by the men in the hold is on behalf of the ship, but the operations subsequent to the grain being elevated from the hold is on behalf of the receivers. The ordinary method at the Port of London for discharging grain in bulk is by employing pneumatic suction pumps. The barley loaded at Alexandria contained a quantity of sand and stones, with the result that the suction pump became choked and the discharge was thereby delayed for a day and a half. The men working on the discharge also demanded and received extra payment owing to the condition of the barley, but the defendants were not required to assent to the extra payment. The Port of London Authority demanded from the plaintiffs and received payment for the extra cost of the discharge in respect of men and machinery. The plaintiffs claimed to recover from the defendants demurrage in respect of the day and a half during

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which the ship was delayed owing to the condition of the barley, alleging that it was an implied term of the contract under which the barley was shipped that it should be capable of being handled and unloaded expeditiously and effectively by the machinery and appliances in ordinary use at the port of discharge. The plaintiffs also claimed to recover from the defendants a proportion of the extra charges in connection with the discharge which they had been obliged to pay the Port of London Authority:—

Held, that no warranty that the barley was capable of being handled and unloaded expeditiously and effectively by the machinery and appliances in ordinary use at the port of discharge could be implied, and that therefore the plaintiffs were not entitled to recover in respect of the extra time taken in the discharge.

Acatos v. *Burns* (1878) 3 Ex. D. 282 applied. *Mitchell, Cotts & Co.* v. *Steel Bros. & Co.* [1916] 2 K. B. 610 distinguished.

Held further that the plaintiffs were entitled to recover from the defendants a portion of the extra charges incurred in respect of the discharge, because a request by the defendants to the plaintiffs to assent to the increased charges on behalf of the defendants must be implied in law.

ACTION tried before McCardie J. in the Commercial List.

The plaintiffs, who were an Italian company carrying on business at Naples, and the owners of the steamship *Posilipo*, on March 11, 1921, entered into a charterparty with R. J. Moss & Co. of Alexandria as berth charterers to convey a cargo on the *Posilipo* from Alexandria to London or Hull as ordered on signing bills of lading.

The charterparty provided that "a full and complete cargo of cotton seed and/or other lawful merchandise at the option of the berth charterers" should be loaded on the ship. "Steamer to be discharged as fast as she can deliver in accordance with the custom of the port." The demurrage rate for every running day over and above the lay days allowed for loading was 250*l*. The charter further provided that the master if desired by the charterers should sign one general set of bills of lading for the whole cargo at the freight specified therein, and that the berth charterers should be at liberty to sign sub bills of lading in favour of the various shippers at any rate of freight which should be duly honoured by the master as though they had been signed by him.

About 500 tons of barley were loaded on the *Posilipo* at Alexandria as part of the general cargo, one bill of lading

being signed in respect of 300 tons and another bill of lading being given in respect of the remaining 200 tons.

The bill of lading in respect of the 300 tons of barley stated that the barley was "shipped in good order and condition by the Société d'Avances Commerciales in and upon the good steamship *Posilipo*" and was "to be delivered in like good order and condition at the Port of London" to the order of the shippers. The bill of lading also contained this provision: "Cargo to be received by consignees as fast as steamer can deliver in accordance with the custom of the port."

The defendants were the indorsees of the bill of lading for the 300 tons of barley for full value.

All unloading at the Port of London is done under statutory provisions by the Port Authority who provide all the necessary machinery and employ all the men. The work done by the men who work in the hold of the ship and who are called ship's men is on behalf of the ship, but the operations subsequent to the grain being elevated from the hold till it reaches the warehouse where it is put into bags, or into the craft, are done on behalf of the receivers of the cargo. The Port of London Authority publish duly authorized tables of rates and charges with respect to grain and seed and other matters, and these provide for an extra charge on cargoes or portions of cargoes exceptional in character arising from the nature, stowage or condition of the goods. The book of rates dealing with grain and seed contains in addition to the scale charges this statement: "Grain in a damaged or heated condition or involving extra expense from any other cause will be charged at special additional rates"; and on p. 10: "An additional charge will be made when extra expense is involved in the working out owing to the condition of the goods or to any other cause."

McCardie J. found that the barley which was loaded at Alexandria was of inferior quality, as it contained a quantity of sand and dust and a number of stones and other rubbish. When the *Posilipo* arrived in London she began to discharge the barley by the ordinary methods used for grain—namely, by pneumatic suction, but owing to the stones and rubbish

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in the barley the valves of the suction pump became choked, with the result that the machinery stopped working, so that a delay to the vessel of about a day and a half was occasioned by the defective condition of the barley.

In addition to the delay to the vessel the men employed in the discharge of the barley, finding that the condition of the barley would interfere with the remuneration they expected to receive, made a complaint to the Port of London Authority and refused to work unless they were paid at a higher rate. With the assent of the plaintiffs an arrangement was made whereby an extra payment was made to the men. The defendants however were never asked to assent to the extra charges. The Port of London Authority demanded payment from the plaintiffs of the extra charges incurred in connection with the discharge both as regards the extra payments to the men and the extra cost owing to the discharge being retarded, and the plaintiffs paid those charges.

The plaintiffs in this action claimed to recover from the defendants as indorsees of the bill of lading for the 300 tons of barley, in respect of the delay caused to the ship in the discharge of the cargo, at the rate of 250*l.* per day.

The plaintiffs alleged in their statement of claim that it was an implied term and condition of the contract under which the barley was shipped and carried to be implied from the express terms thereof that the same should be capable of being handled and unloaded expeditiously and effectively by the machinery and appliances in ordinary use at the port of discharge. They also alleged that the barley was not capable of being so handled and unloaded by reason of the presence of the sand and stones in the barley whereby a delay of one day and nineteen hours was occasioned to the ship.

The plaintiffs also claimed to recover from the defendants a proportion of the extra charges in connection with the discharge which they had been obliged to pay the Port of London Authority on the ground that they had paid that amount as the agents for the defendants and at their request to be implied in the circumstances.

Dunlop K.C. and *G. W. Ricketts* for plaintiffs. The defendants in this case being indorsees of the bill of lading with respect to 300 tons of the 500 tons of barley shipped stand in the shoes of the shippers and are liable for their default. The shippers when they undertook to ship 500 tons of barley in bulk impliedly undertook to ship barley which was in good condition and which could be discharged in bulk within the usual time: *The Moorcock* (1); and if they shipped barley mixed with foreign substances which prevented it being discharged within the usual time they would fail to discharge that undertaking and be liable to the shipowners. The shippers warrant that they will not ship with the article to be shipped any other substance which would increase the burden upon the shipowners. The same principle applies whether the act of the shipper causes damage to the ship or delay: see *Mitchell, Cotts & Co.* v. *Steel Brothers & Co.* (2) where Atkin J. expressed the view that a shipment of goods which might involve the ship in danger of forfeiture or delay was precisely analogous to the shipment of a dangerous cargo which might cause the destruction of the ship. Sect. 1 of the Bills of Lading Act, 1855, provides that: "Every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such . . . . indorsement, shall . . . . be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." Therefore the defendants as indorsees stand in the same position as the consignors as regards the shipowners and if the delay was caused by the fault of the consignors the defendants as indorsees cannot rely upon any excuse not available to the consignors: see Scrutton on Charterparties, 10th ed., p. 180.

[McCARDIE J. referred to Salmond on Torts, 5th ed., p. 430.]

The duty in contract is wider than is there stated. A person who ships goods is under a greater liability in contract than he would be under in tort if he puts into the goods something that ought not to be there.

(1) (1889) 14 P. D. 64. (2) [1916] 2 K. B. 610, 614.

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[McCARDIE J. referred to Leslie's Law of Transport by Railway, pp. 19–32.]

The defendants were under an obligation to take delivery within a reasonable time: *Lyle Shipping Co.* v. *Cardiff Corporation.* (1) The defendants are also liable for part of the extra charges which the Port of London Authority have charged in respect of the discharge owing to the condition of the barley. The discharging, although done by the Port Authority, was a joint operation, the shipowners being liable for the cost of the work in the hold and the receivers for the rest of the work, and therefore the receivers are liable for the extra amount paid to the men for their share of the work and also for the extra amount charged owing to the suction pump becoming choked. The fact that the order that the work should be done and the extra charges paid was given by the plaintiffs is immaterial, as otherwise the discharge of the ship would have been stopped and the consignees would have been liable for a much larger sum for demurrage.

Leck K.C. and *D. H. Leck* for defendants. The defendants are indorsees of a bill of lading which does not refer to the charterparty and does not incorporate its terms, therefore the action against the defendants is based entirely upon the bill of lading. Under the charterparty the berth charterers had to load a full and complete cargo of cotton seed and/or other lawful mechandise at their option and the charterers committed no breach of that charterparty, merely because what was shipped took longer to discharge than barley, so long as what was shipped was lawful merchandise, neither did they commit a breach of the charterparty by shipping barley which contained some dirt. The bill of lading contains no contract as to what should be shipped but only a statement as to what had been shipped. It is a receipt for the goods stating the terms on which they were delivered to and received by the ship, but it is not a contract: per Lord Bramwell in *Sewell* v. *Burdick.* (2) It is true that there is an obligation upon the consignee under the bill of lading to receive the cargo as fast as the ship could deliver, but there is no implication of any

(1) [1900] 2 Q. B. 638, 643. (2) (1884) 10 App. Cas. 74, 105.

further obligation. As no time was fixed for discharge the consignees are only liable if they fail to take delivery with reasonable despatch and there is no suggestion of any delay on the part of the consignees. There is no implied term in the contract, such as the plaintiffs suggest, that the barley shipped should be capable of being handled and discharged expeditiously and effectively by the machinery and appliances at use at the port. It was held in *Acatos* v. *Burns* (1) that no warranty on the part of the owner of goods shipped on board a vessel can be implied that they are fit to be carried on the voyage if the shipowner had an opportunity of examining them.

[McCARDIE J. referred to *Bamfield* v. *Goole and Sheffield Transport Co.* (2).]

There is an implied undertaking by shippers not to ship dangerous goods without notice: see Scrutton in Charter-parties, 10th ed., p. 111, art. 31, but there is no such implied undertaking where the goods are not dangerous goods, but merely cause delay. In any case as Atkin J. pointed out in *Mitchell, Cotts & Co.* v. *Steel Brothers & Co.* (3) the duty or warranty does not extend beyond cases where the shipper has knowledge, or means of knowledge, that the condition of the goods would cause delay, and there is no evidence here that the shippers knew that the barley would cause delay. There was no warranty by the shippers as to the condition of the barley. Even if the barley was not in good order and condition the bill of lading states that it was shipped in good order and condition and the shipowners are estopped from saying that it was not shipped in good order and condition: *Compania Naviera Vasconzada* v. *Churchill and Sim* (4), and the shipowners cannot say that extra expense was incurred by reason of the condition of the barley, the shipowners must themselves bear that expense unless the charterparty exempt them from that liability: *Leach & Co.* v. *Royal Mail Steam Packet Co.* (5); *Holman* v. *Dasnieres.* (6) The fact that the shipowners have paid the extra charges to the Port of London

(1) 3 Ex. D. 282.
(2) [1910] 2 K. B. 94.
(3) [1916] 2 K. B. 610, 614.
(4) [1906] 1 K. B. 237.
(5) (1910) 16 Com. Cas. 143.
(6) (1886) 2 Times L. R. 480, 607.

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Authority does not give the shipowners the right to recover them from the consignees, although it may be that the Port Authority could have recovered the extra charges from the consignees. The plaintiffs allege that they paid the extra charges as agents of the defendants and that there was an implied request to pay them. But the facts proved do not support the allegation. The rights and liabilities of a consignee of goods under s. 1 of the Bills of Lading Act, 1855, are confined to the rights and liabilities with regard to the goods mentioned in the bill of lading. No claim can be maintained against an indorsee of a bill of lading that the goods carried ought not to have been shipped.

Dunlop K.C. replied.

McCARDIE J. In this case there are two distinct claims by the plaintiffs, the owners of a vessel called the *Posilipo*, against the indorsees of a bill of lading who received the goods thereunder. In my opinion the points which arise with regard to the different claims are quite distinct. The first claim is for damages for detention of the *Posilipo*. The second claim, in substance, is one for moneys paid by the shipowners to the use of the defendants. [His Lordship then stated the facts and continued:]

I will deal first with the question of the delay of the ship. It is not alleged by the plaintiffs that the cargo was not taken as fast as the ship could actually deliver the cargo. There was no actual default in that respect by the receivers. They were bound to act with reasonable expedition as is shown by the decisions in *Good & Co.* v. *Isaacs* (1) and *Hick* v. *Rodocanachi* (2), and they did so. The real claim for delay against them is based upon the case alleged in para. 6A of the statement of claim, and this paragraph raises a somewhat important point as to the obligation of a shipper of goods. It asserts this: "Alternatively it was an implied term and condition of the contract under which the barley was shipped and carried as aforesaid to be implied from the nature and express terms thereof"—that is the bill of lading—"that the same should

(1) [1892] 2 Q. B. 555. (2) [1891] 2 Q. B. 626; [1893] A. C. 22.

be capable of being handled and unloaded expeditiously and effectively by the machinery and appliances in ordinary use at the port of discharge." The statement of claim goes on to allege that the barley was not capable of being so handled and unloaded by reason of the presence of the sand and stones in the barley and in consequence delay to the ship was occasioned. That is the allegation. Is it well founded? If it is, a wide vista of responsibility is opened as against the shippers of goods. It is difficult to see at what stage the application of the duty alleged would stop and it is difficult to see how the measure of the liability by the shipper would be fixed. Mr. Dunlop cited in support of the proposition the decision of Atkin J. in *Mitchell, Cotts & Co.* v. *Steel Bros. & Co.* (1) But in my view before considering that case it is desirable to remember the rule which exists with respect to the shipment of dangerous goods. The principle applicable to the matter is lucidly stated in Scrutton on Charterparties, art. 31, as follows: "By the common law of England the shipper of goods impliedly undertakes to ship no goods of such a dangerous character or so dangerously packed that the shipowner or his agent could not by reasonable knowledge and diligence be aware of their dangerous character, without notice to the shipowner or his agent of such dangerous character; and he is therefore liable to any person who is injured by the shipment of such dangerous goods without notice." The authorities quoted under that article seem clearly to establish the proposition as to the duty of a shipper with respect to dangerous goods. I think it is well to recognize the fact that the decision of Atkin J. in *Mitchell, Cotts & Co.* v. *Steel Bros. & Co.* (1) to which I have just referred undoubtedly enlarges the duty of a shipper, because in that case the shippers of a cargo of rice, which is not a dangerous cargo in itself, upon a vessel which they had chartered for a voyage to Piræus, knew that the rice could not be discharged there without the permission of the British Government, although they thought that they might obtain permission. They however failed to obtain permission to discharge at the

(1) [1916] 2 K. B. 610.

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Piræus and the ship was delayed. It was found that the shipowner did not know and could not reasonably have known that the permission of the British Government was necessary to enable the ship to discharge her cargo of rice at the Piræus, and it was held that the delay arose from a breach by the charterers of their obligation to the shipowners, and that the shipowners had a cause of action against the charterers. But if the rule as to dangerous goods is extended to matters which do not involve danger a very wide field is opened for discussion. In my view, however, there is no warranty that this barley was capable of being handled and unloaded expeditiously and effectively by the machinery and appliances in ordinary use at the port of discharge, and I think that the decision which I am giving is fully supported by the cases which show the duty which does not rest upon the shipper. The intermediate area may sometimes be a matter of doubt. The case cited by Mr. Leck for the defendants of *Acatos* v. *Burns* (1) is useful. That was a case of a cargo of maize shipped by the plaintiff and which owing to the vice of the maize sprouted so that further transport was impossible. One of the questions in the action was whether the shipper of the maize had warranted that the maize was fit for carriage in the vessel, and it was held by the Court of Appeal that where the owner of a vessel has an opportunity of examining goods shipped on board her, no warranty on the part of the shipper of the goods can be implied that they are fit to be carried on the voyage. In my view the principle of that case, and not the principle of the cases as to dangerous goods, is applicable to the facts here. If it were otherwise the position would be strange. There may be a variation as to the length of time necessary for the discharge of various qualities of barley, but the shipowner can inquire as to the quality of barley shipped and he can inspect the barley. All that happened in this case was that 300 tons of barley were shipped on board. No description was given as to the character or nature of the barley, that is to say whether good or bad or otherwise. As

(1) 3 Ex. D. 282.

Mr. Leck has pointed out, under the berth charter the charterers had the power to load a complete cargo of cotton seed and/or other lawful merchandise at their option. In my view therefore there was no warranty with respect to this barley that it should be capable of being handled and unloaded expeditiously and effectively by the machinery and appliances in ordinary use at the port of discharge. I see no reason to doubt that the shipowners did know, and certainly could have known as fully as the shippers, the nature and description of the cargo. There is no suggestion of concealment or secrecy. If there had been something here other than mere defect of quality I should have reserved my opinion, because in my opinion the obligations of a shipper with respect to a warranty as to the character of the goods that he ships have not yet been fully and clearly determined. Atkin J. has gone one step beyond the dangerous goods principle. Whether the law may go further is a matter for consideration, but I only mention for the purposes of future discussion when the question may again arise, that many authorities which may call for consideration are referred to in the recent book by Mr. Leslie on the Law of Transport at pp. 29 et seq.

Now inasmuch as I find that there was no warranty in the present case it is unnecessary to consider the points which arise with respect to s. 1 of the Bills of Lading Act, 1855, as to whether, if there had been a breach of warranty by the berth charterers or by the original shipper of these goods, s. 1 of the Act of 1855 would have transmitted the responsibility for that breach to the present holders for value of the bill. That point I leave without further observation. I only desire to add with regard to the implication of terms in a bill of lading or charterparty that the facts of this case, which deal only with quality of barley, are in my opinion not such as would lead me willingly to an implication of the implied term alleged in the statement of claim. The case of *Hamlyn & Co.* v. *Wood & Co.* (1) would seem to be unfavourable to that implication. It further follows that

(1) [1891] 2 Q B. 488.

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I need not consider the question that has been raised as to estoppel.

I come now to the second point, which in my view rests upon a wholly different basis. All unloading at the Port of London is done by the Port of London Authority under statutory authority. The Port Authority have published duly authorized tables of rates and charges with respect to grain and seed and other matters and these tables provide for an extra charge on cargoes or portions of cargoes exceptional in character arising from the nature, stowage or condition of the goods. For instance the following statement is made in the Grain and Seed Book, at p. 10: "An additional charge will be made when extra expense is involved in the working out owing to the condition of the goods or to any other cause." Now by virtue of the condition of this barley extra expense was caused. Extra charges were paid to the corn trimmers, and the condition of the barley caused the suction machinery and attendant workmen to be employed for a longer period than would otherwise be the case. Therefore the Port of London Authority charged, and in my view, properly charged, substantially more than they would have done if the cargo had been in a normal condition. The shipowners have paid those charges and they seek to recover from the defendants a portion of those extra charges upon the ground that they have paid that portion to the use of the defendants. The defendants were not requested to assent to the extra charges. In my opinion however upon the facts of the present case there must be deemed to have been an implied request in law by the defendants to the plaintiffs to assent to the increased charges for and on behalf of the defendants. Let me make the position quite plain. The operation of unloading is a joint operation. The trimmers are in the hold and they are called ship's men and work on behalf of the ship; they are of course employed by the Port of London Authority. But the operations from the time the grain is elevated from the hold and taken upwards till it gets to the warehouse where it is put into bags and then into craft are done on behalf of the receivers. Therefore although there is one totality of operations, as a

matter of fact there is a clear division with respect to the allocation of work. Of the total extra charge made by the Port of London Authority and paid by the shipowners about 8*l.* 13*s.* 6*d.* is in respect of extra labour for the receivers' part of the operation, and 50*l.* for the burden upon the machinery with respect to work done for the receivers making a total of about 58*l.* odd. Mr. Leck relies upon the point that there was no request by the defendants to do the work and pay the increased charges. I appreciate that point, but in my opinion it is impossible, in view of the cases in which requests have been implied by law, to hold that the defendants are not liable. This question, although perhaps somewhat new as regards shipping, is not at all novel with regard to railways. and I will merely refer to several cases upon the matter as showing the circumstances in which the Court will imply a request in spite of a protest, or in spite of the fact that the defendant ignores what is proceeding: see *Great Northern Ry. Co.* v. *Swaffield* (1); *London & North Western Ry. Co.* v. *Duerdin* (2); *London & North Western Ry. Co.* v. *Crooke & Co.* (3), and *Midland Ry. Co.* v. *Myers, Rose & Co.* (4) To my mind those cases show clearly the extent to which the law will go in implying a request in a case where the interests of two persons are concerned, and where it is essential that one should do something in order to carry out the joint interests. Now here there was a joint obligation on the shipowners and the receivers. It was essential that the ship should be discharged as fast as she could be. It was one operation in substance but two for the purposes of allocation, and there was a payment made by the plaintiffs which to the extent of the figures that I have stated was, in my opinion, not only in fact, but in law for the benefit of the defendants. The work they are charged with was work which was done for them, and the liability of the defendants, in my opinion, is wholly independent of any question of warranty or of any question as to the quality of the cargo. It is a liability which depends

(1) (1874) L. R. 9 Ex. 132.
(2) (1915) 31 Times L. R. 367.
(3) (1904) 20 Times L. R. 506.
(4) [1908] 2 K. B. 356; [1909] A. C. 13.

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upon the fact that it was their cargo which was being discharged from this vessel.

The result is therefore that the defendants succeed upon the first point raised by Mr. Dunlop as to delay, but that they are liable in regard to the second claim to the extent of three-fifths of 58*l.* as they were receivers of only 300 tons out of the 500—namely, 35*l.* 3*s.* 6*d.* There will be no costs on either side.

Judgment accordingly.

Solicitors for plaintiffs: *Constant & Constant.*
Solicitors for defendants: *Lowless & Co.*

R. F. S.

1922
Nov. 3.

EVERETT *v.* ISLINGTON GUARDIANS.

Jury—Right to Jury—Action "in which fraud is alleged"—Administration o Justice Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 81), *ss.* 2, 3.

By the proviso to s. 2, sub-s. 1, of the Administration of Justice Act, 1920, it is enacted (inter alia) that "no order for trial without a jury shall, except with the consent of both parties, be made . . . . where the action . . . . is one in which fraud is alleged":—

Held, that to come within those words a relevant issue of fraud must be raised, which will have to be decided in order to determine the rights of the parties, and that it is not sufficient for the plaintiff merely to allege that the defendant acted fraudulently.

APPEAL from Clerkenwell County Court.

The plaintiff sued to recover 1*l.*, being part of the penal sum of 5*l.* recoverable by him as common informer from the defendants under 32 Hen. 8, c. 9, s. 3, for unlawfully maintaining one Griffiths and one Anklesaria in certain bankruptcy proceedings instituted by them against him.

By his particulars of claim the plaintiff alleged (para. 2) that "the cost of the said maintenance was unlawfully taken from the ratepayers of the said parish"; and (para. 3) that "in acting as aforesaid the defendants acted dishonestly both to the ratepayers and to the alleged debtor (now the common informer)."

The defendants applied to the county court judge for an

order that the action should be tried by the judge alone, as the action was one which could not be conveniently tried with a jury. The plaintiff opposed this application, but the county court judge made the order asked for. In giving his decision the judge said that he was satisfied that the action could not as conveniently be tried with a jury as without one, being influenced by the fact that the action of maintenance was of a technical and difficult character. He added that the mere fact that the plaintiff in his particulars of claim alleged that the defendants acted dishonestly to the ratepayers and to him did not change the nature of the cause of action.

The plaintiff appealed.

Plaintiff in person. In view of the allegation in para. 3 of the particulars of claim that the defendants "acted dishonestly" in maintaining the bankruptcy proceedings, I have a statutory right under ss. 2 and 3 of the Administration of Justice Act, 1920 (1), to have the action tried with a jury. An allegation of "dishonesty" is equivalent to an allegation of fraud: see per Wills J. in *Ex parte Watson.* (2) This action is therefore "one in which fraud is alleged" within the proviso to s. 2.

W. T. Monckton for the defendants was not called upon.

AVORY J. In my opinion this appeal fails. The plaintiff contends that the case is one in which he has a statutory right to a trial by jury under the proviso to s. 2, sub-s. 1, of the Administration of Justice Act, 1920. The first question

(1) Administration of Justice Act, 1920, s. 2, sub-s. 1, provides that where in any action in the High Court the Court or a judge is satisfied that the action cannot as conveniently be tried with a jury as without a jury, the Court or a judge may order that it shall be tried without a jury, "provided that (*a*) no order for trial without a jury shall, except with the consent of both parties, be made under this section where the action or matter is one in which fraud is alleged or in which there is a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction, or breach of promise of marriage. . . . ."

Sect. 3 empowers the like order to be made in the county court for trial without a jury, "provided that (*a*) no order for trial without a jury shall be made where the action or matter is one in the case of which, if it were tried in the High Court, there would be no power under the provisions of this Act to order a trial without a jury. . . . ."

(2) (1888) 21 Q. B. D. 301, 309.

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Avory J.

therefore to be determined is whether this is an action in which "fraud is alleged" within the meaning of the proviso. The plaintiff's claim is to recover a penalty under 32 Hen. 8, c. 9, from the defendants for having unlawfully maintained certain bankruptcy proceedings instituted against him. In my opinion, notwithstanding the plaintiff's allegation in para. 3 of his particulars of claim that "in acting as aforesaid the defendants acted dishonestly both to the ratepayers and to the alleged debtor (now the common informer)," this is not an action in which fraud is alleged within the meaning of the proviso to s. 2, sub-s. 1, of the Act of 1920. It cannot be sufficient to bring a case within those words of the proviso that a plaintiff should merely allege in his particulars that the defendant has acted fraudulently. Suppose an action is brought for the price of goods sold and delivered. The only issue is whether the goods have been paid for or not. It cannot be sufficient for the plaintiff in such an action to allege that the defendant is a fraudulent person to entitle him to obtain trial by jury under this proviso. The words in question in the proviso refer to a case where a relevant issue of fraud is raised. No such relevant issue is raised in this action, and the county court judge was therefore right in making the order that the action should be tried without a jury. [His Lordship also held that in the circumstances there was no ground for saying that the county court judge, in deciding that the action could more conveniently be tried without a jury than with a jury, had not exercised his discretion judicially.]

SALTER J. I agree. The words of the proviso to s. 2, sub-s. 1, of the Administration of Justice Act, 1920, "where the action . . . . is one in which fraud is alleged," refer, in my opinion, to an action in which it appears, so far as can be foreseen, that it will be necessary to decide an issue of fraud in order to determine the rights of the parties. This is not an action of that kind.

Appeal dismissed.

Solicitors for defendants: *Samuel Price, Sons & Robertson.*

J. S. H.

[IN THE COURT OF CRIMINAL APPEAL.]

C. C. A.
1922
March 6, 7.

THE KING *v.* SULLIVAN.

Criminal Law—Evidence—Witnesses for Prosecution recalled after (a) *Evidence by Prisoner,* (b) *Speech for Defence—Power of Judge to recall Witnesses.*

A judge has in a criminal trial a discretionary power, with which a Court of Appeal cannot interfere, unless it appear that an injustice has thereby resulted, of recalling witnesses at any stage of the trial and of putting such questions to them as the exigencies of justice require.

In a trial for the murder of a woman, evidence was given on behalf of the prosecution that the prisoner had been seen near the scene of the murder shortly before it was committed and on several of the preceding days; that certain articles which had been left by the murderer in the cottage where the murder was committed had previously been seen in the possession of the prisoner and that the prisoner had sold a suit of clothes stolen from the cottage to a woman. The prisoner gave evidence on his own behalf in which he set up an alibi and denied that he was in the neighbourhood of the scene of the murder when it was committed, or that the articles found in the cottage belonged to him, or that he had sold the suit to the woman. By the direction of the judge certain witnesses for the prosecution were recalled to rebut the evidence given by the prisoner. The counsel for the prisoner subsequently in his speech to the jury after the speech for the prosecution suggested that the husband of the murdered woman might have committed the murder, and also commented upon the fact that certain of the articles found in the cottage were not found till two days after the murder. The judge directed that the two police constables who searched the cottage should be recalled to say when and where the articles were found, the evidence which they gave being mainly a repetition of what they had previously said. The husband of the murdered woman was also recalled to deny the suggestion made against him :—

Held, that the witnesses had been recalled not for the purpose of repeating their evidence, but for the purpose of rebutting the case set up by the prisoner in his evidence and of meeting the suggestion made by the counsel for the prisoner in his speech to the jury—namely, that the murder had been committed by the husband of the murdered woman, and that therefore the witnesses were properly recalled even after the counsel for the prisoner had made his speech to the jury.

Rex v. *Crippen* [1911] 1 K. B. 149 and *Rex* v. *Remnant* (1807) Russ & R. 136 followed.

APPEAL from a conviction.

The appellant was tried before Darling J. at the Monmouth Assizes upon indictment for the wilful murder of Margaret

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Thomas on October 26, 1921. He was convicted and sentenced to death.

Margaret Thomas, who was the wife of David Thomas, lived in a cottage near the road which runs between Abergavenny and Newport in Monmouthshire. The garden of the cottage ran down to the bank of a canal. The woman was murdered about 7 A.M. on October 26. The murder was probably committed for the purpose of robbery, as the house was found to have been ransacked, the drawers opened, and things stolen, including the purse of the deceased woman containing 19*s.* 1*d.*, a blue serge suit and a pair of boots. In the cottage were found certain articles which were not there before the murder and which had been left by the murderer; these included a tin such as a tramp carries in which to make his tea, a red handkerchief and an old pair of boots.

The case for the prosecution was that the appellant, who was leading the life of a tramp, had been seen in the neighbourhood of the cottage for some days previous to October 26. On that day he was seen by a witness named Smith at about 5.15 A.M. on the canal bank going in the direction of Abergavenny, a route which would take him past the cottage where the woman was murdered. At about 8.15 on this same morning he was seen by Mrs. Smith walking very quickly along the canal bank from that direction and going in the opposite direction—namely, towards Pontypool. On the same day between 12 and 1 o'clock the appellant was in a public-house called the "Forge Hammer Inn," about nine miles from the cottage where the murder was committed. He was then in possession of money, as he not only paid for beer for himself but subsequently also treated other persons who were in the house. The landlady of the house, a Mrs. Annie Jones, gave evidence to the effect that on the first occasion the appellant paid with silver and that on the subsequent occasion he paid with a Treasury note. Evidence was given by a Mrs. Groves to the effect that on November 11, the day following the inquest on the murdered woman, the appellant sold to her the pair of boots which had been stolen

from the cottage and the jacket of the blue serge suit, and that two days later he sold to her the remainder of the suit. Evidence was also given by the two police constables who searched the cottage after the murder, and also by David Thomas the husband of the murdered woman, who was severely cross-examined by counsel for the prisoner. Evidence was also given by several witnesses identifying each of the articles found in the cottage and left behind by the person who committed the murder, as having been in the possession of the appellant previous to October 26.

The appellant gave evidence denying that he had been in the neighbourhood of the cottage either on the day of the murder or on the preceding days. He set up by way of defence an alibi, alleging that he was with a man named Stewart, who had been called as a witness for the prosecution, at the Celynin coke ovens, a considerable distance away from the scene of the murder, on the early morning of October 26. He denied that the tin found in the cottage belonged to him and alleged that the only tin which he had was one given to him by Stewart. He also denied that he sold the blue serge suit to Mrs. Groves. He admitted that he had been in the "Forge Hammer Inn" on October 26 and spent between 6*s*. and 7*s*., but said that he had paid in silver and had not given a Treasury note in payment.

At the close of the appellant's evidence, no other witness being called for the defence, the judge directed that certain witnesses should be recalled, including Stewart, who denied that he had ever given to the appellant a tin, and also denied that he had spent the night preceding the murder with the appellant at the Celynin coke ovens; Mrs. Annie Jones, who swore that the appellant gave her a Treasury note in payment for the drinks he had ordered at the "Forge Hammer Inn"; and Mrs. Groves, who reaffirmed that the appellant was the man from whom she bought the boots and the blue serge suit.

At the conclusion of this evidence the judge directed that a shorthand note of the speeches of counsel should be taken by the shorthand writer.

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After Mr. Powell K.C. had addressed the jury for the prosecution Mr. Bosanquet addressed them for the prisoner. In the course of his address Mr. Bosanquet commented upon the evidence given by David Thomas as being very unsatisfactory and suggested that he was not telling the whole truth and hinted that possibly he had himself murdered his wife. He also commented on the fact that the red handkerchief which had been left in the cottage was not found till two days after the murder was committed.

At the conclusion of the speeches the judge directed that the two police constables who searched the cottage after the murder should be recalled, and questions were put to them as to when and where the various articles which had been left behind in the cottage were found, the evidence which they gave being in the main a repetition of the evidence they had formerly given. The husband David Thomas was also recalled in order to state the relations which existed between himself and his wife, and to deny the suggestion made against him. Mr. Bosanquet was given an opportunity of cross-examining all these witnesses and of addressing the jury again.

S. R. C. Bosanquet for the appellant. The judge committed an irregularity at the trial in recalling witnesses for the prosecution (*a*) after the appellant had given evidence and (*b*) after counsel had made his speech to the jury for the defence. Sect. 2 of the Criminal Evidence Act, 1898, provides that where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution. It was held in *Rex* v. *Crippen* (1) that it was in the discretion of the judge whether evidence which had not been tendered in chief could be given as rebutting evidence, but although some of the evidence given in this case was in the nature of rebutting evidence, much of the evidence of the witnesses recalled was not given for the purpose of rebutting evidence or to supply a deficiency; the witnesses were recalled merely to repeat the evidence which they had already

(1) [1911] 1 K. B. 149.

given. Such evidence is not admissible, and counsel for the prosecution would not have been entitled to have witnesses recalled in order to give such evidence. A judge has no more power to recall a witness for that purpose than a counsel has. To recall witnesses to repeat their evidence was an injustice to the prisoner and a conviction so obtained cannot stand.

Powell K.C. and *Lort Williams* for the Crown. The prisoner in giving evidence on his own behalf set up an alibi and also a new case with regard to the tin. He also denied that he had sold the blue serge suit to Mrs. Groves. It was therefore necessary to recall some of the witnesses in order to meet that case. Further, it was in the interest of the prisoner that some of the witnesses should be recalled, as they might have made a mistake as to identity. Counsel for the defence in his speech to the jury made an insinuation that David Thomas had committed the murder, and commented upon the time when some of the articles were found in the cottage as pointing in that direction. It was therefore necessary to recall David Thomas to rebut that suggestion. The police constables were also recalled, but their evidence, although it was in the main a repetition of their former evidence, was really directed towards meeting the suggestion made by the prisoner's counsel in his speech to the jury. A judge has greater power in a criminal case with regard to calling witnesses than he has in a civil case.

[SANKEY J. referred to *In re Enoch and Zaretsky, Bock & Co.'s Arbitration* (1)]

That was a very different case from the present. That was a civil case, and it was held that neither a judge nor an arbitrator has any right to call a witness in a civil action without the consent of the parties. In the present case no new witnesses were called and no new issues raised by their evidence.

S. R. C. Bosanquet in reply. In *Rex* v. *Remnant* (2) after the counsel for the prosecution had closed his case the counsel for the prisoner pointed out a defect in the evidence, and the judge wanted to inquire further, but forbore to do so on it

(1) [1910] 1 K. B. 327. (2) Russ & R. 136.

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being objected that the prosecutor's counsel had closed his case, but the report states that the judges at a subsequent meeting considered that it would have been competent and proper for the judge, if he had thought fit, to have made any further inquiry respecting the property after the counsel had stated that they had closed their case. That was a case of supplying a deficiency and does not apply here. In *Rex* v. *Watson* (1) Taunton J. after the examination of witnesses for the prisoner recalled a witness for the prosecution and then gave the prisoner's counsel an opportunity of cross-examining the witness again. That was also a case of supplying a deficiency and not of repeating evidence already given. In *Reg.* v. *Frost* (2) Tindal C.J. laid down the general rule that "where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises ex improviso, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose ex improviso may not be answered by contrary evidence on the part of the Crown." That is a sound rule. In *Reg.* v. *Haynes* (3) Bramwell B. refused to examine a witness not before called after the cases for the prosecution and prisoner were closed, saying that it was better to abide by the general rule. In *Rex* v. *Howarth* (4) a witness for the prosecution was recalled at the request of the jury after the summing up, and the conviction was quashed as the prisoner was not given an opportunity of cross-examining the witness or of giving evidence in rebuttal. In the present case the appellant was not given an opportunity of contradicting the evidence of the witnesses recalled. It is a general rule that a judge shall not call fresh evidence, his position being no better than that of the counsel for the prosecution, and a fortiori a judge

(1) (1834) 6 C. & P. 653.
(2) (1839) 4 St. T. (N. S.) 86, 386.
(3) (1859) 1 F. & F. 666.
(4) [1918] W. N. 59; 82 J. P. 152.

ought not to recall witnesses in order to repeat the evidence which they have already given.

Powell K.C. in reply on the cases. The suggestion is made in Cockle on Evidence, 3rd ed., p. 375, that the judge has in a criminal case a greater power of calling a witness not called otherwise than in a civil case, as he is charged with the public duty of inquiring into the offence and cannot be restricted to the evidence or material which the parties choose to bring before the Court. The statement is also made in Phipson on Evidence, 6th ed., p. 484, that the judge may at any stage of the trial, either at his own instance or that of a party, recall a witness. In *Rex* v. *Seigley* (1) Hamilton J. held that a prisoner, when once he has made himself a witness, is liable, like any other witness, to be recalled for the purpose of answering such questions as the judge permits to be put to him.

The judgment of the Court (Avory, Sankey and Salter JJ.) was delivered by :—

AVORY J. The appellant in this case was convicted of the murder of a woman named Margaret Thomas, the wife of David Thomas. It is not really disputed on behalf of the appellant, subject to the objection we have to consider, that there was evidence on which the jury could reasonably come to the conclusion that the appellant was the murderer.

Mr. Bosanquet has however objected that the learned judge himself committed irregularities at the trial in recalling witnesses who had already given evidence for the prosecution. That objection falls under two heads. In the first place it is objected that the judge recalled certain witnesses after the prisoner had given evidence, and secondly, it is objected that the judge recalled other witnesses who had been already called as witnesses for the prosecution after counsel had addressed the jury for the defence. Mr. Bosanquet admits that the evidence which some of these witnesses gave when they were recalled was in the nature of rebutting evidence,

(1) (1911) 6 Cr. App. R. 106.

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as it was evidence in rebuttal of that which had been given by the prisoner for the first time. It cannot be contended that there was any irregularity in recalling a witness to rebut evidence given by the accused which had not been previously anticipated by the prosecution. With regard to the witness Stewart, the prisoner had in his evidence set up an alibi that he was with him at the material time, and it was obviously both reasonable and necessary that he should be recalled on that subject. With regard to the tin which was found at the cottage the prisoner had set up what was a new case and it was both reasonable and necessary that Stewart should be recalled as to that also. The judge also recalled at that stage a witness named Annie Jones, who had served the appellant at the public-house, for the purpose of making it plain that the prisoner had while in that public-house tentered a Treasury note in payment for some of the drinks which he ordered. It is quite true that that witness had in her original evidence for the prosecution said something about a Treasury note having been paid by the prisoner, but the prisoner in his evidence had said that he paid a sum of 6*s*. only, apparently representing that he had paid that sum in silver, and it does not appear that there had been any cross-examination of the prisoner as to his having passed that Treasury note at the public-house. In the circumstances it was obviously proper that this witness should be recalled to make it quite clear that the prisoner had in fact passed a Treasury note at the public-house. In addition Mrs. Groves was recalled for the purpose of making it clear that the prisoner was the person who had sold the blue serge suit to her. Until the prisoner himself gave evidence it could not be known to the prosecution whether he was going to admit, or deny, that he had sold those clothes to Mrs. Grove. It was quite possible at that stage before the prisoner gave evidence that he might admit having sold those clothes, and might have said that he had bought them from somebody else a day or so before, because he did not sell the clothes until November 10, many days after the alleged murder, which was committed on October 26; and in the circumstances it

appears to the Court that Mrs. Groves was properly recalled for the purpose of rebutting the denial of the prisoner that he was the person who sold the clothes to her. That disposes of the witnesses who were recalled after the prisoner's evidence, all of whom in the opinion of this Court come within the principle of rebutting evidence, properly so-called. If the prosecution had applied to recall them for that purpose we do not doubt but that the learned judge would have allowed them to be recalled.

So far as the question of calling evidence in rebuttal is concerned, and the principle upon which it should be admitted, it is sufficient to say that we act upon the judgment of this Court in *Rex* v. *Crippen.* (1) The objection there made was that Lord Alverstone C.J., who tried the case, "improperly allowed the prosecution to give evidence after the close of the case for the defence, i.e., rebutting evidence." The judgment of Darling J. is to this effect (2): "In arriving at a decision upon that question the judge ought, no doubt, to have regard to the rule which has been established by the authorities. But the matter is one which is within the discretion of the judge who presides at the trial, who is in a much better position than any Court before which an appeal comes to determine whether it is really fair to allow the rebutting evidence to be given or not and whether it does or does not expose the defence to a disadvantage to which it ought not to be exposed. It does not appear to have been laid down in any of the authorities that if the judge at the trial exercises his discretion in a manner different from that in which the Court of Appeal would have exercised it, that is of itself a sufficient ground for granting a new trial or quashing the conviction." The learned judge later says (3): "The evidence which was admitted in rebuttal was admissible evidence, and Lord Alverstone C.J. saw no reason why, in justice to the defence, it should not be given. He exercised his discretion, and, even if we have the power to do so, we see no reason why we should interfere. But if in any case

(1) [1911] 1 K. B. 149. (2) Ibid. 157.
(3) Ibid. 158.

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it should be shown that the prosecution has done something unfair—has set something in the nature of a trap—which has resulted in an injustice to a prisoner, the Court reserves to itself full power to deal with the matter." We are bound by that judgment and we act upon it in deciding that, as regards the evidence which was called after the prisoner himself had given evidence, the discretion of the learned judge was properly exercised, and it cannot be said in this case there was anything in the nature of a trap which has resulted in an injustice to the prisoner.

We have now to deal with a further objection. It appears that at the close of this rebutting evidence when counsel on both sides were about to address the jury the learned judge requested the shorthand writer to take a note of the speeches. That is a practice which has been authorized by this Court in consequence of the frequent criticisms which we have to listen to of the summing up of the presiding judge in a criminal trial, and it has been pointed out that it is necessary that the Court should be in a position to know the issues which have been discussed by counsel in their addresses to the jury. The summing up must always be read in the light of the issues which have been raised by counsel in their speeches. It is obvious therefore that the learned judge in this case saw reason to anticipate that there might be some issue raised in the course of the speeches which had not been put with sufficient plainness before the jury up to that time. In the course of Mr. Bosanquet's address to the jury on behalf of the prisoner he put before them, in a way which they could not misunderstand, a suggestion that this murder may have been committed by the woman's husband, David Thomas. We do not say that Mr. Bosanquet was not justified in making that suggestion in the course of his address. In a case of this kind counsel for the defence is justified in exploring every possible avenue which might lead to the acquittal of the accused. It is true that in the cross-examination of David Thomas by Mr. Bosanquet certain questions were put which might indicate that some suggestion of this

sort was going to be made, but it is also clear to this Court that those questions and the answers given by David Thomas did not clearly put before the jury that suggestion as being an issue in the case. It is obvious from the re-examination of David Thomas by Mr. Powell, who appeared for the prosecution, that to his astute mind, this suggestion was being made, but the minds of twelve jurymen are not always as astute as that of counsel. The judge, having heard this suggestion made in terms which could not be mistaken by the jury, in the exercise of his discretion then recalled two police constables and the husband, David Thomas. Mr. Bosanquet does not complain that David Thomas was not properly recalled for the purpose of giving him an opportunity of denying in terms the suggestion that he was the man who had murdered the woman. But Mr. Bosanquet contended that the two police constables were recalled for the mere purpose of stating over again the evidence which they had already given as witnesses for the prosecution. If the Court had come to the conclusion that that objection was well founded, and that these two police constables had merely been recalled for the purpose of restating that which they had already sworn to in their examination in chief, the Court would have been bound to hold that the recalling of the two police constables for that purpose was an irregularity, and the Court would then have had to consider whether any substantial miscarriage of justice had been occasioned thereby. After looking carefully at the evidence of these police constables, however, we are satisfied that they were not recalled for the mere purpose of restating that which they had already sworn to in their examination in chief, but that they were recalled for the same purpose as that for which the husband, David Thomas, was recalled—namely, to answer this suggestion that David Thomas was the person who committed the murder. When one looks at the questions which were put to them as to the time when, and the places in which, the articles which had been left behind in the cottage were found, it becomes clear that the object with which the questions were being put was to

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show that it was improbable, to say the least of it, that those articles could have been put there by David Thomas himself. In other words to make it more plain that those articles had been left behind by the man who committed this murder.

The right or power of a judge to recall witnesses has been much discussed before us, and Mr. Bosanquet has assisted the Court in calling attention to all the authorities. It is not necessary to go through them at length, because it appears that the power of the judge to recall witnesses stands on much the same footing as the power of allowing rebutting evidence to be called; that is to say, that the judge has a discretionary power with which a Court of Appeal cannot interfere unless it should appear that a real injustice has resulted. In the well-known work of Taylor on Evidence, § 1477, it is stated that "the judge has always a discretionary power, with which the Court above is very unwilling to interfere, of recalling witnesses at any stage of the trial, and of putting such questions to them as the exigencies of justice require." That principle is recognized in the case of *Rex* v. *Remnant* (1), which has been cited to us. That case is a strong authority on the point, because there the judge was proposing to recall a witness after the case for the prosecution was closed, but the counsel for the defence objected, and the judge gave effect to the objection and abstained from putting questions which might have cleared up a very important matter. Upon consideration by all the judges at a subsequent date, none of the judges seemed to have any doubt but that it would be competent and proper for the judge, if he thought fit, to make any inquiries concerning the property after counsel had stated that they had closed their case.

Having come to this conclusion with regard to the recalling of these witnesses, this Court finds that although no doubt the matter called for consideration—and it has been very fully and ably argued before us—nevertheless the objection fails; that there was no irregularity which caused any injustice at

(1) Russ & R. 136.

all to the prisoner, and that there was ample evidence in the circumstances upon which the jury could reasonably find that the prisoner was guilty. The appeal must therefore be dismissed.

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Appeal dismissed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for Crown: *Director of Public Prosecutions.*

R. F. S.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D.
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Feb. 6, 7, 14.
C. A.
July 14, 18.

ADELAIDE STEAMSHIP COMPANY *v.* THE KING.

[1919. A. 485.]

Shipping — Insurance — War Risk or Marine Risk — "Consequences of hostilities or warlike operations" — Requisition of Ship — Use as Ambulance Transport—Collision—Negligence.

The *Warilda*, a steamship, was requisitioned by the Government in 1916 upon the terms of charterparty T. 99, under which the owners undertook marine risks and the Admiralty undertook war risks, including "all consequences of hostilities or warlike operations." She was used as an ambulance transport and was armed with a gun and had on board two or three Royal Navy men to work it, and her master was instructed that, if he were attacked by a submarine, he should take advantage of any exceptional opportunity of ramming the submarine. While carrying a number of wounded men with doctors and nurses from Havre to Southampton and, by order of the Admiralty, proceeding at night at full speed and without lights, she came into collision with another vessel and was injured. The *Warilda* was alone to blame for the collision, which was due to the negligence of those in charge of her.

In a petition of right by the owners of the *Warilda*, who claimed that their vessel had been damaged in consequence of a warlike operation:—

Held, (1.) that the vessel was at the time of the accident engaged in a warlike operation.

In re P. & O. Branch Service and Commonwealth Shipping Representative [1922] 1 K. B. 706 followed.

(2.) that in the circumstances the negligence of those in charge of her was immaterial.

Judgment of McCardie J. reversed.

PETITION OF RIGHT tried before McCardie J. without a jury.

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The following statement of the facts is taken in the main from the written judgment of the learned judge.

The suppliants were the owners of the *Warilda*, a twin-screw steamship of 7713 tons gross register and 426 feet long. In 1915 she was requisitioned by the Australian Government for use as a transport for bringing Australian troops to England. Upon the completion of that service in July, 1916, she was taken over by the British Government for use as a military hospital ship. It is agreed that the rights of the parties are governed by the terms of the charterparty known as T. 99, which contained the following clauses :—

" 18. The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk."

" 19. The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extensive clause : ' Warranted free of capture, seizure and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war.' "

" 22. The master shall obey all orders and instructions which he may receive from the Admiralty or from any officer authorized by them, and shall in all respects comply with the instructions for masters of colliers and oiler transports, but he shall be solely responsible (on behalf of the owners) for the management, handling and navigation of the steamer."

" 25. If from deficiency of men or stores, breakdown of machinery or any other cause the working of the steamer is at any time suspended for a period exceeding twelve running hours, pay shall cease for the whole of such and any subsequent period of whatever duration during which the vessel is inefficient." . . . .

" 26. Throughout this charter losses or damages whether in respect of goods carried or to be carried or in other respects

arising or occasioned by the following causes shall be absolutely excepted, viz., the act of God, perils of the seas . . . . negligence, default or error of judgment of the pilot, master or crew or other servants of the owners in the management or navigation of the steamer."

The *Warilda* was for some time used as an ordinary military hospital ship; she was painted white, she carried lights, and she bore the white flag with a red cross as provided by the Geneva Convention of 1907; but owing to the outrages on hospital ships by German submarines the British Admiralty was compelled to adopt protective precautions. On April 26, 1917, the following letter was written by the Ministry of Shipping to the suppliants: "I beg to inform you that circumstances have rendered it necessary to take steps for the protection of vessels engaged in cross-channel hospital service, and arrangements have accordingly been made for the *Warilda* to be armed and painted grey. The vessel has been removed from the list of hospital ships and will in future be known as an ambulance transport, and will be treated in the same manner as a troop transport so far as her actual sailing is concerned."

The *Warilda* was then painted grey with dazzle markings, the Red Cross flag ceased to fly and she steamed without navigation lights. A 12-lb. gun was placed aft and two or three Royal Navy men were taken aboard for the purpose of working the gun if the need arose. She became subject to certain Admiralty orders made under the Defence of the Realm Regulations, and her master received the following instructions:—

"As far as possible the passage is to be made during the hours of darkness and at maximum speed compatible with safe navigation in order to elude submarine attack."

"You are not to reduce speed in a fog except when near the land or approaching shoal water unless you consider it is absolutely imperative for the safety of the ship to do so."

"If a submarine is sighted by the escorting destroyer she will turn to attack. The transport is at once to turn away from the submarine and steer a zigzag course unless she has

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an exceptional opportunity of ramming the submarine which she should at once take advantage of."

"You are warned that safety very largely depends on the absolute darkness of the ship and not showing a glimmer of light."

These were the instructions under which she worked as an ambulance transport. At the time of the collision which gave rise to this litigation her duties were to carry wounded men from Havre to Southampton and occasionally to carry nurses or medical staff from Southampton to Havre.

At about 4 o'clock on the morning of March 24, 1918, the *Warilda* was engaged in carrying about 600 wounded soldiers with medical officers and nurses from Havre to Southampton. Acting under the instructions above referred to she was proceeding at her full speed of about 15 knots without any lights showing. The weather was somewhat dark and hazy.

She sighted on her starboard bow the *Petingaudet*, a British steamer of about 2540 tons gross register, proceeding under Admiralty orders from Shields to Rochefort with a cargo of coke and steaming at high speed with side lights dimmed. The *Warilda* saw the *Petingaudet* about half a mile away. She did not alter her course or speed till too late. She struck the *Petingaudet*. The ships were "crossing" ships, and the *Warilda* was the "give way" of the two vessels. No German warship was seen by either vessel, and there was no suggestion that any submarine was about to attack.

In an Admiralty action of the *Owners of the S.S. Petingaudet* v. *Owners of the S.S. Warilda* heard in December, 1918, Hill J. held that the *Warilda* was guilty of negligence, and that she alone was to blame for the collision. This decision was affirmed by the Court of Appeal and the House of Lords. Both the *Warilda* and the *Petingaudet* were seriously injured by the collision.

The suppliants claimed a large sum for the damage sustained by the *Warilda*. They based their claim upon clause 19 of the charterparty T. 99, alleging that their vessel was injured in consequence of warlike operations and that the Admiralty had undertaken this risk.

The answer of the Crown was twofold; first it was contended that the operation in which the *Warilda* was engaged at the time of the collision was not a warlike operation; and secondly that, assuming the *Warilda* was engaged in a warlike operation, the injury she received was not a consequence thereof, but was the consequence of her own negligence.

MacKinnon K.C., *Dunlop K.C.* and *Dumas* for the suppliants.

Raeburn K.C. and *Balloch* for the Crown.

Cur. adv. vult.

Feb. 14. McCARDIE J. delivered a written judgment in which he decided the first point in favour of the Crown after an exhaustive review of the following cases: *Britain Steamship Co.* v. *The King* (1); *Attorney-General* v. *Ard Coasters* (2); *Harrisons, Ld.* v. *Shipping Controller* (3); *British and Foreign Steamship Co.* v. *The King* (4); *In re P. & O. Branch Service and Commonwealth Shipping Representative* (5); *Atlantic Transport Co.* v. *Director of Transports.* (6) The view taken by the Court of Appeal makes it unnecessary to report this part of the learned judge's judgment.

Upon the second point—namely that, assuming the *Warilda* was engaged in a warlike operation, the injury she received was not a consequence thereof, but was due to negligent navigation of the officers in charge of her, the judgment was as follows:—

I hold that the *Warilda* was not a warship, and that she was not engaged in a warlike operation. It is therefore not strictly needed to determine the materiality of the question of negligence. That question, however, was so fully argued before me by counsel for the petitioners and by Mr. Raeburn

(1) [1919] 2 K. B. 670; [1921] 1 A. C. 99.
(2) [1921] 2 A. C. 141.
(3) [1921] 1 K. B. 122.
(4) [1918] 2 K. B. 879.
(5) [1922] 1 K. B. 706.
(6) (1921) 38 Times L. R. 160.

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for the Crown, that I ought to briefly express my opinion upon it. The material words are: "All consequences of hostilities or warlike operations." The word "consequence" is closely interwoven with the notion of causation. It was submitted by the petitioners that if the *Warilda* suffered injury whilst engaged in a warlike operation, the question of negligence was immaterial. It seems that in certain cases negligence may be, for some purposes, immaterial; for example, if an ordinary merchantman be struck by a warship whilst the latter is patrolling for submarines, it may be immaterial (for the purpose of such words as those now in question) that the warship was also guilty of some act of negligence contributing to the injury to the merchantman. Compare the judgment of Roche J. in *Charente Steamship Co.* v. *Director of Transports.* (1) But the present facts are quite different. The question does, I think, arise directly as to whether it was the warlike operation (if the *Warilda* was so engaged) or the negligence of the master which led to her injury. Now Hill J. and the House of Lords held that the *Warilda* was guilty of negligence and was alone to blame for the collision. Is this finding of negligence material? No express decision on the point exists. It is of value, however, to observe the cases where the point arose incidentally. In the *St. Oswald Case* (2) the Attorney-General expressly abandoned any charge of negligence against either of the vessels concerned: see per Swinfen Eady M.R. (3); and as Duke L.J. clearly points out (4): "No case of negligence on the part of either vessel was set up for the Crown." In the *Petersham and Matiana Cases* (5) it was stated in plain language by the noble Lords that none of the vessels concerned were guilty of negligence: see, for example, per Lord Cave (6) and per Lord Atkinson. (7) So, too, in the *Richard de Larrinaga Case* the arbitrator had expressly found that neither vessel was to blame; see per Bankes L.J. (8)

(1) (1921) 38 Times L. R. 148.
(2) [1918] 2 K. B. 879.
(3) Ibid. 883.
(4) Ibid. 889.
(5) [1921] 1 A. C. 99.
(6) Ibid. 101, 105.
(7) Ibid. 117.
(8) [1920] 3 K. B. 65, 70.

It would appear, therefore, that the highest authority regards the question of negligence as material, and this, I think, was the view of the Court of Appeal in the unreported case of *Inui Gomei Kaisha* v. *Attolico* (1) on February 7, 1919. The reason was, I conceive, put clearly by Scrutton L.J. in the *St. Oswald Case* (2) where he says: "The military operation must be the direct or dominant cause of the loss."

If the petitioners were correct in their argument, then it would matter not how gross the negligence which has led to the injury. It seems to me that the contention of the petitioners here is opposed to the principle of the basic decision of *Ionides* v. *Universal Marine Insurance Co.* (3), and the principle there indicated. I do not gather that the reference by Erle C.J. (4) to "unskilful navigation" was dissipated (as to the materiality of negligence) by Lord Sumner in the *Petersham Case.* (5) The noble Lord, I think, merely explains the dictum of Erle C.J.

If, then, negligence be material (as I hold) in such a case as the present, the only question seems to be whether the hurt to the *Warilda* was caused through the negligence of the master or through a warlike operation—if such was the operation (contrary to my own view) in which the *Warilda* was engaged. The question of "cause" may often be difficult. As Lord Shaw felicitously said in the *Leyland Shipping Co. Case* (6): "Causation is not a chain, but a net." A concise statement of several weighty dicta with respect to causation will be found in the judgment of Duke L.J. in the *St. Oswald Case.* (7) It was well said by Sir Frederick Pollock in his work on Torts, 11th ed., p. 36, that: "The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause": see, too, per Bankes L.J. in *In re Polemis and Furness, Withy & Co.* (8)

In the present case I respectfully adopt the suggestion

(1) Unreported. See Lloyd's List, Feb. 10, 1919.
(2) [1918] 2 K. B. 879, 886.
(3) (1863) 14 C. B. (N. S.) 259.
(4) Ibid. 286.
(5) [1921] 1 A. C. 130.
(6) [1918] A. C. 350, 369.
(7) [1918] 2 K. B. 879, 890.
(8) [1921] 3 K. B. 560, 570.

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of Lord Sumner in *Weld-Blundell* v. *Stephens* (1), and I ask the question what was the "direct cause" of the injury to the *Warilda*? In my opinion the "direct cause" was the negligence of her master. Unless this be so I do not see how the House of Lords could have held that she was responsible for the whole damage to the *Petingaudet*. The warlike operation (if it was one) did not cause the loss. The negligence of the master was more than a causa magna et gravis. It was the new, independent, dominant and directly operative cause of the collision.

For these reasons I hold that the suppliants fail.

Judgment for the Crown.

R. F. S.

The suppliants appealed.

MacKinnon K.C., *Dunlop K.C.* and *Dumas* for the appellants. McCardie J. has held first that this vessel was not engaged in a warlike operation. That decision cannot stand since the decision of this Court in *In re P. & O. Branch Service and Commonwealth Shipping Representative*, shortly known as the *Geelong Case*. (2) No distinction can be drawn between moving military stores from one base of operations to another and moving wounded soldiers from the field of battle to a home base.

If that be so the learned judge's second decision, that the negligence of those in charge of the *Warilda* prevents the suppliants from recovering, loses its support. If the vessel was a merchantman and the only ground for saying that she was engaged in a warlike operation was that she was sailing without lights, then the negligence of those in charge of her might be material on the question whether she was lost in consequence of a warlike operation; for example, if she was lost through the negligent navigation in broad daylight or in bright moonlight, it could not perhaps be said that she was lost in consequence of a warlike operation at all, although in fact she was sailing without lights. But most warlike operations exclude this line of argument. If

(1) [1920] A. C. 956, 983. (2) [1922] 1 K. B. 706.

a war vessel is manœuvring in the course of a naval engagement and is sunk in a collision with another war vessel, the question whether the collision was due to the negligence of her navigating officer is altogether beside the point. It is one of the risks insured against in a war risks policy: *Ard Coasters* v. *The King* (1); *British India Steam Navigation Co.* v. *Green* (2); *Charente Steamship Co.* v. *Director of Transport.* (3)

Raeburn K.C. and *Balloch* (*Sir Ernest Pollock A.-G.* with them) for the Crown. The learned judge was right in holding that the *Warilda* was not engaged in a warlike operation. This case is distinguishable from the *Geelong Case.* (4) Conveying wounded soldiers from France to England is a very different operation from conveying war stores from Mudros to Alexandria in time of war. The purpose of the latter operation is warlike; that of the former is humanitarian and peaceful.

But assuming the operation was warlike, the case is not then concluded. There is the further question, was the injury to the *Warilda* the consequence of the warlike operation? That is to say, was it the direct effective cause? It was not, if the real cause of the injury was the negligence of those in charge of the vessel; and it has been conclusively established that the injury was solely due to this negligence. This has always been considered a crucial question: *British and Foreign Steamship Co.* v. *The King* (5); *Larchgrove* (*Owners*) v. *The King* (6); *Britain Steamship Co.* v. *The King* (7). In the *Geelong Case* (8) itself Scrutton L.J. considered himself conditionally bound by decisions in the House of Lords to hold that the sinking of a ship by collision with a vessel engaged in a warlike operation makes the matter a war risk, as being a consequence of warlike operations; but the condition is "there being no negligence." *Inui Gomei Kaisha* v. *Attolico* (9) is to the same effect.

MacKinnon K.C. in reply.

(1) (1919) 35 Times L. R. 604.
(2) [1919] 1 K. B. 632, 637.
(3) 38 Times L. R. 148.
(4) [1922] 1 K. B. 706.
(5) [1917] 2 K. B. 769, 773; [1918] 2 K. B. 879.
(6) (1919) 36 Times L. R. 108.
(7) [1921] 1 A. C. 101, 105, 110, 115.
(8) [1922] 1 K. B. 706, 718.
(9) Unreported. See Lloyd's List, Feb. 10, 1919.

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BANKES L.J. This is an appeal from McCardie J. It raises an important point, which has been the subject of discussion elsewhere, but comes now for the first time before this Court. It is an appeal from the learned judge's judgment on a petition of right. The facts out of which the petition arises were as follows: On March 24, 1918, the suppliants' vessel, the *Warilda*, while crossing with wounded soldiers from Havre to Southampton came into collision with another vessel, the *Petingaudet*, with the result that both vessels were injured. An action was brought in the Admiralty Division, and ultimately the House of Lords, affirming this Court, held that the *Warilda* was alone to blame, the grounds being that she did not alter her course or speed as soon as she ought to have done after first sighting the other vessel. After that decision the question arose on which this petition of right was based—namely, whether in the circumstances the collision was a consequence of a war risk or of a marine risk. To decide that question it is necessary to go into the facts more fully. The *Warilda* was in the first instance requisitioned by the Australian Government. Then she was taken over by our Government, and for the purposes of this case it is agreed on all hands that she was taken on the terms of the charterparty T. 99 under which the Government accepted responsibility for the risks included in the following clause: "Warranted free of capture, seizure, and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war." Having thus been taken over she was used as a hospital ship, but owing to the action of the Germans in reference to hospital ships she was removed from that category, and under regulations made for that purpose she was transferred into a class known as ambulance transports. A gun was placed on board of her and her captain was told that he was not bound in all events to refrain from defending the vessel, but that on the contrary if attacked by a submarine it might be his duty to ram the submarine if an opportunity occurred.

On these facts two questions have been debated: first, whether at the time of the collision the *Warilda* was engaged in a warlike operation; and the second whether, assuming she was so engaged, the collision was a consequence of that operation or whether it was due to an independent intervening cause—namely, the negligence of those in charge of the *Warilda*. Upon the first point I am unable to distinguish this case from the *Geelong Case* (1) recently decided in this Court. In that case the vessel in question was engaged in carrying war stores and ambulance wagons from one war base to another. In the opinion of Bailhache J. that fact itself was enough to establish that the vessel was engaged in a warlike operation. In this Court the Master of the Rolls was not prepared to go that length; but it appeared from the evidence that the stores and wagons were being transported in the course of evacuating Gallipoli, and he held that this did constitute a warlike operation. He said (2): "Now if what she was doing was a part of the operation of the evacuation of Gallipoli I think she would be carrying out a warlike operation just as much as she would have been if she had been carrying things for the purpose of the landing upon Gallipoli." Scrutton L.J. was prepared to agree with Bailhache J. He said: "I am prepared to hold that carrying ambulance wagons and Government stores from one war base to another in time of war was a warlike operation." But I am content to accept the view of the Master of the Rolls. I can draw no distinction between conveying military stores in the course of evacuating Gallipoli and conveying wounded soldiers via Havre to Southampton from the fighting line in France. Even if I differed from that decision I should follow it in this case, because in my judgment it is undesirable that this Court should draw fine distinctions between cases so closely analogous. But in saying this I do not wish to be taken as in the least dissenting from *The Geelong* (1), which appears to be largely based on *Britain Steamship Co.* v. *The King*. (3)

(1) [1922] 1 K. B. 706. (2) Ibid. 714.
(3) [1921] 1 A. C. 99.

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I pass now to the second point, whether the collision was a consequence of the warlike operation, within the meaning of clause 19 of the charterparty, or was due to an independent intervening cause, the negligence of those in charge of her. This question has at times been referred to in this Court, but always with a view to saving it for further consideration. There has been no definite expression of opinion how it should be decided, unless perhaps one case. *Inui Gomei Kaisha* v. *Attolico* (1) may be thought to contain such an expression. I should like in a few words to set that case in its proper place in the discussion which has taken place before us. It was decided in 1918 by Roche J. and in 1919 by this Court. Two merchant vessels both engaged in their ordinary trading operations collided in the Mediterranean. It is true that owing to war restrictions both were sailing without lights. The case was opened in the Court below and treated all through as turning upon the issue of negligence. The particular question which has been argued in the present case never arose. My judgment was upon the case presented to the Court and upon the facts proved in the case; it has no direct bearing upon the points to be decided in this case and contains nothing contrary to the view I am about to express.

The particular point has been dealt with in the Court below on three occasions, twice by Bailhache J. and once by Roche J.; and each of those learned judges has expressed the view that where a collision takes place between a merchant vessel and a warship the status of the vessel injured has a material bearing on the question how far negligence on the part of those in charge of the injured vessel prevents the injury from being a consequence of warlike operations. If a merchant vessel engaged in a trading operation by her own negligence brings herself into collision with a war vessel the injuries she receives may be not the consequences of a warlike operation but the consequences of her own negligence. But if a war vessel engaged in a warlike operation by her own negligence brings herself into collision with a merchantman

(1) Unreported. See Lloyd's List, Feb. 10, 1919.

the injury which the war vessel suffers is the consequence of a warlike operation, and it is immaterial to consider whether the collision was brought about by her own negligence, because it is one of the risks incidental to warlike operations that those in charge of a war vessel may by their negligence bring her into collision with another vessel. In the *Ard Coasters Case* (1), where the *Ardgantock*, a merchant vessel, collided with the *Tartar*, a warship, Bailhache J. said that "in his view, therefore, the collision was not due to any negligence on the part of the *Ardgantock*. As to the *Tartar*, if she was on a warlike operation, it would not matter whether she was negligent or not, but in justice to the officer in charge of her he could not see any negligence on her part." Again in *British India Steam Navigation Co.* v. *Green* (2) Bailhache J. said: "I do not think negligence on the part of the King's officer would matter. The operation would still be a warlike operation although badly performed. As a fact I have no evidence of his negligence." In *Charente Steamship Co.* v. *Director of Transport* (3) Roche J. said: "If a merchant ship was solely to blame for a collision, then, speaking broadly, it would seem to follow in most cases that the collision would not be a result of hostilities because it was not the result of a warship's acting in a warlike operation. If the warship was to blame different considerations arose. Probably in most cases, though not perhaps in all, she would be to blame for negligence in carrying out the naval operation in progress and in such cases he agreed with the view of Bailhache J. that negligence would be immaterial because it would not constitute a new and independent cause." And later he said: "Where, in such a case, an essential and necessary part of the direct and immediate cause of a loss was a warlike operation, whether well or ill conducted, he would hold that the loss was a consequence of hostilities or warlike operations." I agree, where a war vessel engaged in a warlike operation is injured by a collision in circumstances like those in the present case. I do not mean to say there

(1) (1919) 35 Times L. R. 604; 36 Times L. R. 555; [1921] 2 A. C. 141.
(2) [1919] 1 K. B. 632, 637.
(3) 38 Times L. R. 148, 149.

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may not be cases in which those in charge of a warship engaged in a warlike operation may be guilty of negligence leading as an independent intervening cause to a collision, negligence which would take the injury out of the class of war risks and bring it into the class of marine risks; but that cannot be said of the negligence in this case. Acting upon orders the *Warilda* was proceeding at night at full speed without lights. The warlike operation on which she was engaged under these conditions involved the risk of injury by the negligence of those in charge, negligence closely connected with the operation and not in any sense an independent intervening cause. Being engaged in a warlike operation the vessel may be treated as if she were a battleship. If a battleship proceeding under war conditions on a particular voyage comes into collision with another vessel the collision is a consequence of the warlike operation, even though it be brought about by the negligence, possibly some minor act of negligence, on the part of those in charge of the battleship.

For these reasons I am unable to agree with the decision of McCardie J. The appeal must be allowed and judgment must be entered for the suppliant in the form to be decided upon after discussion.

WARRINGTON L.J. I am of the same opinion. This case raises two points for decision. The first is whether the *Warilda*, one of the two vessels in collision, was at the time engaged in a warlike operation, so that prima facie the loss due to the collision would be a consequence of warlike operations; and the second point is whether that result is displaced by the fact that the *Warilda* has been found to be guilty of negligence in the way in which she was conducting her operations on the night in question.

Upon the first point I agree with Bankes L.J. that it is impossible to distinguish this case in favour of the Crown from *The Geelong*. (1) On the contrary the facts of this case lead more forcibly to the conclusion that the injured vessel

(1) [1922] 1 K. B. 706.

was engaged in a warlike operation. The *Warilda* had originally been employed as a hospital ship. She was on the list of hospital ships exchanged with the German Government, and under the provisions of the several conventions governing the conduct of war she was under an obligation to abstain from all warlike acts, in return for which obligation she was immune from capture and attack of all kinds by warships or other military forces of the enemy. Owing to the conduct of the Germans in attacking hospital ships, this ship and others were taken off the protected list and were thereby released from their obligation to abstain from warlike acts themselves. They were placed in a class called ambulance transports. This particular ship was used for conveying doctors and nurses and wounded soldiers from Havre to Southampton. The collision happened on March 24, 1918, at a time when warlike operations of a specially active kind were proceeding in France, and on that night she was on a voyage from Havre to Southampton with 600 wounded men who were being taken or had come back from the battlefield in France to Havre, which was our base on the French coast, and were being transported in this ship to Southampton. It seems to me that that was about as clearly a warlike operation as any operation of that sort could be. In the course of transporting wounded men from the actual battlefield to the home base, assuming this is a warlike operation to begin with, how can any point be fixed at which the transport ceases to be a warlike operation? Mr. Raeburn admitted that it would be practically impossible to find any such point. In my opinion, therefore, even if we had not been, as I think we are, bound by the decision in *The Geelong* (1), I should come to the conclusion that the operation on which the *Warilda* was engaged on the night in question was a warlike operation.

That conclusion being reached, the case raises for the first time for actual decision the question which has often been alluded to in previous cases—namely, whether negligence on the part of a ship engaged in warlike operations is material

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and prevents the loss from being a loss arising as a consequence of the warlike operation. I need not refer in detail to the three cases mentioned by Bankes L.J. in which Bailhache and Roche JJ. have both expressed their opinions on this point. But I wish to say a word about *Inui Gomei Kaisha* v. *Attolico* (1), to which in common with Bankes L.J. I was a party. That case when its facts are carefully considered will be seen to fall into a different class from that to which the present case belongs. The only fact which could be relied on as involving the ships in a warlike operation was that they were steaming without lights. They were both merchantmen and both were engaged on a peaceful voyage, but under instructions from the Admiralty they were both steaming without lights. If, as was established, the ships were guilty of negligence (sufficient, as it seems, to have caused the collision in broad daylight) then the collision was independent of the only fact which gave a warlike colour to their operations—namely, the steaming without lights. In the present case both the status of the *Warilda* and the nature of her voyage determine the nature of the operation on which she was engaged. It was a warlike operation.

Then was the collision the consequence of that warlike operation? In my opinion it was. Such negligence as was established on the part of the *Warilda*—an error in not changing her direction at the moment when it was thought she ought to have done so, and in not slackening speed at the moment when it was thought she ought to have done so, when she was steaming on a dark night under instructions directing her to maintain full speed even in a fog—such negligence as that seems to me to be merely incidental to the warlike operation she was conducting and not to be a new and independent cause intervening and occasioning the loss. I do not wish to do more than decide this case on the facts of this case. There may be negligence of such a kind as to be a new and intervening cause between the loss of a ship and an undoubtedly warlike operation on which she is engaged. That case is not concluded by anything I have

(1) Unreported. See Lloyd's List, Feb. 10, 1919.

said and is to be regarded as open. For the reasons I have given I think the judgment of McCardie J. was wrong and ought to be discharged.

ATKIN L.J. I agree. The first question is whether this vessel on this voyage from Havre to Southampton was engaged in a warlike operation. Upon that point I think it is only necessary to say that we are bound by the *Geelong Case.* (1) The *Geelong* was conveying from one war base to another stores and munitions of war in the course of evacuating Gallipoli, a country that had to be occupied for warlike purposes. The *Warilda* was requisitioned by the Admiralty as an ambulance transport, and was conveying wounded combatants from a war area to a home base. I am unable to distinguish the one case from the other. If any distinction is to be drawn it must be by some Court and some authority other than this. In a case like this it is important to avoid fine-drawn distinctions which impair the authority of the decisions of the Court.

The other question is how is the case affected by the admitted fact that one of the circumstances of the collision was negligent navigation of the *Warilda?* In order to solve this question it is important to bear in mind the terms of the contract between the owners of this ship and the Admiralty. It is common ground that the terms are those contained in that clause of the charter T. 99, which provides that the risks of war taken by the Admiralty are those which would be excluded from an ordinary English policy of marine insurance by the following or a similar but not more extensive clause: "Warranted free of capture seizure and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war." In construing that clause we are not dealing with "consequences of warlike operations" as being some other mode of stating the cause of the collision, and for that purpose it is necessary to refer to the judgment of

(1) [1922] 1 K. B. 706.

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Lord Sumner in *Green* v. *British India Steam Navigation Co.*, the *Matiana Case* (1), where, adopting the words of Willes J. in *Ionides* v. *Universal Marine Insurance Co.* (2), "the words 'all consequences of hostilities' refer to the totality of causes, not to their sequence," he says: "They are used to save a long enumerative description of incidents of capture seizure or detention or of hostilities or warlike operations, as if one had said 'all forms of hostilities or warlike operations of whatever kind' and some form or kind of hostility or warlike operations must have proximately caused the loss." Therefore the question is, whether the loss was proximately caused by a warlike operation. The *Warilda* was engaged in the warlike operation of navigation of an ambulance transport in the Channel at the time of the collision. She must be treated exactly as if she were a battleship. That is the view taken by Lord Atkinson in *Britain Steamship Co.* v. *The King*, the *Petersham Case* (3), where he says: "The transfer of the combative forces of a power from one area of war to another, or from one part of an area of war to another part, for combative purposes, would, I think, be a 'warlike operation' within the meaning of this charterparty, as would also be the patrolling by the ships of war belonging to a nation of the sea coast of that nation, or of an allied nation, for the purpose of preventing invasion." When the navigation of a vessel is a warlike operation the question may arise whether, if the vessel engaged in the warlike operation comes into collision with another, the damage caused is proximately caused by the warlike operation or, if the operation is being conducted unskilfully, whether the want of skill prevents the collision from being proximately caused by a warlike operation. To my mind that question is tested by another—namely, Does the warlike operation cease to be a warlike operation because it is being negligently conducted? That question only admits of one answer; it does not. Warlike operations would be few if there were excluded from that class all operations which are not conducted with care and

(1) [1921] 1 A. C. 99, 131. (2) 14 C. B. (N. S.) 259, 290.
(3) [1921] 1 A. C. 99, 114.

skill; and if a vessel navigated with reasonable skill and care and coming into collision with another can be said to sustain damage proximately caused by the operation, the same may be said of her when she is being navigated without reasonable care and skill. Could it be said, for example, that the *Warilda* if she was steaming at 6 knots an hour when the collision occurred would be engaged in a warlike operation, but if she was steaming at 12 knots an hour would not be so engaged? This seems to make it clear that the presence or absence of negligence does not decide the question whether a particular loss is the consequence of a warlike operation. To direct a shell against a vessel would occasion a loss by a warlike operation and the loss would be none the less the consequence of a warlike operation because the shell was negligently directed against another vessel or against some object other than a vessel. So a merchantman rammed by a battleship sustains damage in consequence of a warlike operation whether the battleship is navigated with reasonable care and skill or not. The negligent conduct of warlike operations is a risk of war and is one of the risks intended to be covered in this particular case. If the injury to the merchant vessel were the matter in question there could be no doubt she could recover on a war risk policy in these terms, and I can draw no distinction between injury to the merchantman and injury to the war vessel herself in the circumstances I have put. Therefore it seems to me that the loss here was proximately caused by the warlike operation.

I wish to reserve the case where the loss is caused by the negligence not of the war vessel but of the merchant vessel itself. It might be that then the loss was not caused by the warlike operation, which was the navigation of the warship. That matter may be discussed when it arises. For the reasons I have given there seems to be no authority binding this Court to hold that this loss was not a consequence of a warlike operation; on the other hand the discussion in the House of Lords points to the conclusion at which we have arrived. The appeal must therefore be allowed. There is some

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question whether the owners of the *Warilda* can recover not only for the damage done to their vessel but also the damages and costs they had to pay in the collision action.

MacKinnon K.C. There is also the hire which the Admiralty stopped paying while the *Warilda* was being repaired.

BANKES L.J. The appeal will be allowed. The judgment will be set aside. There will be a declaration that the suppliants are entitled to recover, and the amount is to be ascertained by a judge of the Commercial Court.

Appeal allowed.

Solicitors for appellants: *Parker, Garrett & Co.*
Solicitor for the Crown: *The Treasury Solicitor.*

W. H. G.

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[IN THE COURT OF APPEAL.]

STERNS, LIMITED *v.* VICKERS, LIMITED.

[1921. S. 683.]

Sale of Goods—Sale of undivided Portion of larger Bulk—Deterioration in Quality of Goods before Severance—At whose Risk?

The defendants sold to the plaintiffs 120,000 gallons of white spirit, being part of a larger quantity then lying in a certain tank belonging to a storage company, and handed to the plaintiffs a delivery warrant, whereby the company undertook to deliver that quantity of the spirit to the plaintiffs' order. Subsequently to the plaintiffs' acceptance of that warrant and before the quantity purchased had been severed from the bulk the spirit in the tank became deteriorated in quality:—

Held that, whether the property in the undivided portion of the larger bulk had passed or not, upon the acceptance of the delivery warrant the risk passed to the buyers, and the loss must be borne by them.

Judgment of Shearman J. reversed.

APPEAL from judgment of Shearman J. at the trial.

On January 3, 1920, the Admiralty sold to the defendants

200,000 gallons of white oil or spirit then lying at Thames Haven in the custody of the London and Thames Haven Oil Wharves Company, on the terms that the defendants should have free storage until January 31, and that if further storage was required after that date they should make their own arrangements for it with the storage company. On January 17 the defendants sold to the plaintiffs "120,000 gallons of spirit of Admiralty origin similar to the bulk samples you drew and now lying in tank No. 78 at Thames Haven in the care of the London and Thames Haven Oil Wharves Company . . . . into your packages or tanks at 1*s.* 11*d.* per gallon." The defendants added: "With regard to the question of storage insurance etc. after the end of this month, we will discuss this with you," and in a further letter on January 20 said: "With reference to the question of storage . . . . we suggest that it would be much better for you to make your own arrangements with the Thames Haven Company." On January 23 the plaintiffs resold the spirit which they had bought to Leopold Lazarus "for delivery spot at 2*s.* 7*d.* per gallon." "All charges including storage and insurance for buyers account. Quantity about 120,000 gallons —good spirit of Admiralty origin similar to bulk sample submitted, now lying in Tank 78 London and Thames Haven Oil Wharves Co. Copy of Redwood's certificate attached." The certificate attached showed (inter alia) that the specific gravity of the spirit was ·786 at a temperature of 60° F. On January 28 the defendants obtained from the Thames Haven Company a delivery warrant "for 120,000 gallons ex white oil in bulk deliverable to Messrs. Stern, Ld., or assignees only against this warrant duly indorsed on payment of rent from the 28th January, 1920, and all other charges. . . . . This warrant is the only document issued as a legal symbol of these goods." That warrant the plaintiffs indorsed to Lazarus, but as Lazarus did not desire to take delivery at that time he made his own arrangements for further storage with the company and paid them storage rent. He left the spirit in storage for some months, and when he came to take delivery it was found that the spirit in the tank was

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deteriorated in quality, the specific gravity, which was admitted to have been, according to contract, ·786 at the date of the delivery warrant, having risen to ·8045. The cause of this alteration in the specific gravity was possibly due in part to evaporation consequent on the purchaser's long delay in taking delivery, but it was mainly due to the fact of the storage company having, when a considerable portion of the contents of the tank had been drawn off, filled it up with other spirit of a slightly different gravity. The company did so in accordance with their practice, which they claimed to be reasonable and necessary in order to avoid the wasting of the storage capacity of a partially emptied tank. Lazarus having claimed damages from the plaintiffs for the deterioration of the spirit, the plaintiffs claimed over against the defendants, alleging a breach of a warranty that the spirit should be of the contract quality when delivered. For the defendants it was contended that the property in the 120,000 gallons passed to the plaintiffs on the sale to them and the acceptance of the delivery warrant notwithstanding that the quantity so sold had not been separated from the bulk, and that consequently the loss must fall on the purchasers. For that proposition the defendants relied on *Whitehouse* v. *Frost.* (1) There Dalton, who owned a tank containing forty tons of oil, sold ten tons of it to Frost, who resold the same to Townsend. Frost gave Townsend a delivery order on Dalton which Dalton accepted. Subsequently and before severance from the bulk Townsend became bankrupt. Dalton at Frost's request refused to deliver the oil. In an action of trover by the assignee in bankruptcy against Frost and Dalton it was held by the Court of King's Bench that the property in the oil although unsevered had passed, and that the plaintiff could recover. Shearman J. however was of opinion that that case was of doubtful authority, and that the question was governed by ss. 16 and 17 of the Sale of Goods Act; that even if the goods were to be treated as specific the property would only pass where so intended by the parties, and that upon facts they did not

(1) (1810) 12 East, 614.

intend that the property should pass until actual severance. He accordingly held that the loss must fall upon the vendors and gave judgment for the plaintiffs.

The defendants appealed.

Cyril Atkinson K.C. and *Giveen* for the appellants. The property in the 120,000 gallons passed to the plaintiffs upon the acceptance by them of the delivery warrant. The goods were "ascertained" goods within the meaning of the Sale of Goods Act, being portion of the contents of a specific tank. The fact that they were not separated from the bulk did not prevent the property from passing. Suppose the owner of goods in bulk sold part to A. and the residue to B., and then before the bulk had been separated became bankrupt, surely his trustee could not claim them on the ground that the property in their respective portions had not passed to the buyers. In fact the property in the whole would have passed to them as tenants in common. That is equally the case here. But even if the property in the unsevered portion did not pass the risk passed upon the acceptance of the warrant. As the plaintiffs did not wish to take immediate actual delivery the defendants by handing them the warrant gave them what was equivalent to delivery. From that time the storage company held the spirit on the buyers' account, and the buyers paid the storage rent. Thenceforward as between the plaintiffs and the defendants the spirit lay at the plaintiffs' risk.

Thorn Drury K.C. and *Le Quesne* for the respondents. Neither the property nor the risk in the unseparated gallons of spirit passed to the plaintiffs. The case on which the defendants' counsel relied in the Court below as showing that the property could pass before severance—*Whitehouse* v. *Frost* (1)—has been generally discredited. (2) In *Austen* v. *Craven* (3) the defendants sold to Kruse fifty hogsheads of sugar, part of a larger bulk. Kruse resold them to the

(1) (1810) 12 East, 614.
(2) Benjamin on Sales, 6th ed., p. 378n.
(3) (1812) 4 Taunt. 644.

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plaintiff, and gave him a delivery order on the defendants which they accepted. The plaintiff paid Kruse the price, but as the defendants could not get payment from Kruse they refused to deliver to the plaintiff. It was held by the Common Pleas that the property had not passed and that the plaintiff could not maintain an action of trover. That decision was followed in *White* v. *Wilks* (1), where the defendant sold twenty tons of oil out of a large stock to Messrs. Shuttleworth and gave them a note that he held that amount in his cistern for their accommodation, and charged them storage rent. Messrs. Shuttleworth having become bankrupt before payment the defendant refused to deliver. It was held that the assignees in bankruptcy could not sue in trover. Then if the property did not pass neither did the risk, for by s. 20 of the Sale of Goods Act, "Unless otherwise agreed the goods remain at the seller's risk until the property therein is transferred to the buyer," and there was no evidence of any such agreement here.

BANKES L.J. The judgment of the learned judge against which this appeal is brought deals with only one of the two points which have been discussed during the argument before us—namely, the question whether the property passed, and on that particular point I do not propose to express any opinion. The other point, to which the learned judge does not allude, although we are told that his attention was called to it, seems to me to be clear. The facts lie in a small compass. The Admiralty were possessed of a large quantity of white oil or spirit in bulk lying at Thames Haven. The defendants on January 3, 1920, purchased a portion of it, and on January 17 sold to the plaintiffs a portion of what they had bought. The spirit was at the time contained in a tank, No. 78, belonging to the London and Thames Haven Oil Wharves Company. The contract between the defendants and the plaintiffs provided that the spirit should be similar to the bulk samples drawn, which samples on analysis showed a specific gravity of ·786. The defendants by the terms of their contract with the Admiralty were allowed free storage

(1) (1813) 5 Taunt. 176.

in the Thames Haven Company's tank until January 31, and it was agreed between the defendants and the plaintiffs that the plaintiffs should make their own arrangement with the Thames Haven Company for the further storage of the spirit after that date. On January 23 the plaintiffs sold the spirit to a Mr. Lazarus upon a bulk sample with the analyst's certificate attached. That contract provided that all charges including storage should be for buyers' account. It is not disputed that at the time of that contract the spirit was still in tank No. 78, and that the bulk was similar to the sample submitted, that is to say that it was of the requisite specific gravity. On January 28 the defendants obtained from the Thames Haven Company a delivery warrant for the spirit, whereby it was made deliverable to the plaintiffs' order, and handed it to the plaintiffs, who indorsed it to their purchaser. Lazarus, who did not desire to take delivery immediately, entered into an arrangement with the company by which he undertook to pay rent for the storage. The spirit was allowed to remain in storage for a considerable time and it was then found to have deteriorated in quality owing to an alteration in the specific gravity due partly to evaporation but mainly to the storage company having mixed with it spirit of a different specific gravity. The question is Who are to bear the loss of that, the buyers or the sellers? It seems to me plain that, upon the facts quite apart from the question whether the property in the spirit had passed, the risk of deterioration rested upon the buyers, and they must bear the loss.

SCRUTTON L.J. The judgment below seems to have been based on the assumption that the plaintiffs had contracted to purchase a certain quantity of spirit of a particular specific gravity and had had delivered to them a spirit of a different specific gravity from that contracted for. But that assumption does not fit the facts, which were as follows: Messrs. Vickers, the vendors in the present case, were themselves purchasers from the Admiralty of 200,000 gallons then lying in the London and Thames Haven Oil Company's tank. That

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purchase they had made on January 3, and on January 17 they resold to the plaintiffs 120,000 gallons, part of the 200,000 gallons "now lying in tank known as 78 at Thames Haven." I think Mr. Thorn Drury is right in saying that as at the material time there had been no severance of the quantity purchased from the larger bulk there were no specific 120,000 gallons in which the property passed. The question as to the effect of such a sale of an undivided portion of a larger bulk has frequently arisen in the Courts, and was much discussed in the well-known case of *Inglis* v. *Stock* (1), where a similar argument to that which was addressed to us here was addressed to the Court for the purpose of showing that a person who had bought a certain number of tons of sugar, part of a larger stock, had no insurable interest in the quantity bought, because no specific bags had been appropriated to the contract and consequently the property in them had not passed. But as Lord Blackburn there pointed out, although the purchaser did not acquire the property in any particular number of tons of sugar he did acquire an undivided interest in the larger bulk and that undivided interest the House of Lords held to be insurable. The acquisition of an undivided interest in a larger bulk clearly will not suffice to pass the property when the appropriation to the contract has to be made by the vendor himself. As Bayley B. said in *Gillett* v. *Hill* (2): "Where there is a bargain for a certain quantity" of goods "ex a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit, then the right to them does not pass to the vendee until the vendor has made his selection, and trover is not maintainable before that is done." Nor probably will the acquisition of such an undivided interest pass the property, so as to entitle the purchaser to sue for a conversion, in a case where the power of appropriation is, as here, in a third party. But in that latter case, whether the property passes or not, the transfer of the undivided interest carries with it the risk of loss from something happening to the goods, such as a deterioration

(1) (1885) 10 App. Cas. 263. (2) (1834) 2 Cr. & M. 530, 535.

in their quality, at all events after the vendor has given the purchaser a delivery order upon the party in possession of them, and that party has assented to it. The vendor of a specified quantity out of a bulk in the possession of a third party discharges his obligation to the purchaser as soon as the third party undertakes to the purchaser to deliver him that quantity out of the bulk. In the present case, what happened was that at the date of the contract there was a bulk larger than the quantity sold, and it was of the contract quality according to sample. A delivery warrant was issued by the Thames Haven Company undertaking to deliver that quantity from the bulk which at that time corresponded with the sample. That warrant was accepted by the purchaser and by their sub-purchaser, Lazarus, who proceeded to pay rent for the storage from the date of the warrant. In those circumstances I come clearly to the conclusion that as between the plaintiffs and the defendants the risk was on the plaintiffs the purchasers. The vendors had done all that they undertook to do. The purchasers had the right to go to the storage company and demand delivery, and if they had done so at the time they would have got all that the defendants had undertaken to sell them. What the purchasers here are trying to do is to put the risk after acceptance of the warrant upon persons who had then no control over the goods, for it seems plain that after the acceptance of that warrant the vendors would have had no right to go to the storage company and request them to refuse delivery to the purchaser. For these reasons, treating the matter as a question rather of the transfer of risk than of the passing of property—for strictly I do not think the property passed, but only a right to an undivided share in the bulk to be selected by a third person—I think the view taken by the judge below was erroneous. He seems to have considered the question of transferring the risk, and thought there was no evidence of it. With that view I cannot agree. I think the only conclusion to be drawn from the evidence is that the risk did pass. The appeal must be allowed.

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EVE J. I agree in the conclusions at which my Lords have arrived and for the reasons which they have given.

Appeal allowed.

Solicitors for the appellants: *Braby & Waller.*
Solicitors for the respondents: *Bradshaw & Waterson.*

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Poor Rate—Waterworks—Rateable Value—Precepts in Aid of Water Fund—Basis of Assessment—Hypothetical Tenant—Metropolis Water Act, 1902 (2 *Edw.* 7, *c.* 41), *s.* 15.

The Metropolis Water Act, 1902, s. 15, provides as follows:—

Sub-s. 1: "There shall be established a water fund, and all receipts of the Water Board shall be carried to that fund, and all payments by the Board shall be made out of that fund."

Sub-s. 2: "Any sum required to meet any deficiency in the water fund, whether for satisfying past or future liabilities, in any financial year, shall be apportioned . . . ." as therein provided.

Sub-s. 3: "The Water Board shall issue precepts for the sums apportioned to the City and the several boroughs and districts liable.

For a particular financial year, apart from debt charges, the accounts of the appellants, the Metropolitan Water Board, showed a surplus revenue, but with the addition of debt charges they showed a deficiency. The appellants, in exercise of their powers under the above Act, issued precepts to make up this deficiency. The debt charges in question were payments which concerned the landlord and not the hypothetical tenant.

The respondents, in assessing the appellants for rating purposes, included as part of their gross revenue the amount of these precepts:—

Held, that the appellants were wrongly assessed and that the amount of the precepts must be excluded.

Dewsbury and Heckmondwike Waterworks Board v. *Penistone Union Assessment Committee* (1886) 16 Q. B. D. 585, 17 Q. B. D. 384 distinguished and explained.

Semble, the fact that the hypothetical tenant is endowed with statutory power to raise a rate for the purpose of meeting a deficiency is a matter to be taken into consideration in arriving at the rateable value, and under proper circumstances the rateable value may be increased in this respect by the addition of an appropriate percentage.

SPECIAL CASE under s. 40 of the Valuation (Metropolis) Act, 1869.

The appellants were a board incorporated by the Metropolis Water Act, 1902, under which there was vested in the board the water supply of the metropolis and adjoining parts within a defined area. The respondents were the Assessment Committee of the Borough of St. Marylebone in the county of London. The appellants as such waterworks board were the occupiers of a rateable hereditament in the borough of St. Marylebone. This hereditament was included in the quinquennial valuation list for the borough made in the year 1920 at a gross value of 25,660*l.* and a rateable value of 19,362*l.* The gross and rateable values were finally determined by the respondents upon an objection duly brought before them. The appellants being aggrieved by the decision of the respondents duly gave notice of appeal to the Court of quarter sessions for the county of London claiming a reduction of the assessment to 15,021*l.* gross value and 8723*l.* rateable value and the parties thereafter agreed that a judgment in conformity with the decision of the High Court should be entered at the London Quarter Sessions pursuant to s. 40 of the Valuation (Metropolis) Act, 1869.

The Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 15 (1), provides (sub-s. 1) for the creation of a "water fund" to which the receipts of the water board are to be carried and out of which payments are to be made. It further provides (sub-s. 2) that "any sum required to meet any deficiency" in any financial year shall be apportioned amongst the county of London and the various boroughs and districts served by the board; and (sub-s. 3) for the issue of precepts for the sums apportioned to the county and boroughs and districts liable and for the payment to the board of the amounts specified in the precepts.

By the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), uniform maximum charges for the supply of water by the board were fixed. By s. 8 of that Act the maximum charge for a supply for domestic purposes was fixed at 5 per cent. of the rateable value of the house or building or part of a house or building in respect of which

(1) See headnote.

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such supply was required. The maximum charges for supplies for other than domestic purposes were fixed by ss. 16, 17, 29 and 31 of that Act.

The special case so far as material was as follows :—

Para. 6. The basis of assessment adopted by both parties was the balance of the revenue of the board over their expenditure for the year ending March 31, 1920. The respondents included as part of the revenue of the board for the said year the amount of the precepts issued by the board in respect of the said year under the provisions of the said s. 15 of the Metropolis Water Act, 1902 (1), and excluded from the expenditure of the board the amount of the interest charges on the debt referred to in para. 8 hereof.

Para. 7. The deficiency in the Water Fund for the year ended March 31, 1919, in respect of which precepts were issued in the next year, amounted to the sum of 984,867*l.*, but the sum received within the year ended March 31, 1920, under precepts issued by the board, was the sum of 488,139*l.*, the said precepts having been issued in respect of deficiencies accrued down to March 31, 1919.

Para. 8. Out of the total revenue of the board (including money received under the said precepts) the board pay in addition to their ordinary expenditure capital charges—namely, interest on expenditure in connection with the acquisition of their undertaking and interest and sinking fund contributions on the board's capital expenditure since the acquisition of their undertaking.

[The total revenue and expenditure of the board for the year ended March 31, 1920, was shown on the following table, which was attached to the special case :—]

Revenue (excluding precepts).	EXPENDITURE.					Revenue from precepts.	Amount of precepts issued in following year for deficiency shown in column 7.
	Other than debt charges.	Interest charges.	Redemption of debt.	Total debt Expenditure.	Deficiency.		
£	£	£	£	£	£	£	£
3,158,391	2,459,571	1,593,946	89,741	1,683,687	984,867	488,139	984,867

(1) See headnote.

Para. 9. The appellants admit that if the method of calculation adopted by the respondents—namely, to include in the gross revenue of the board's undertaking the amount of the said precepts issued by the board in respect of the year ended March 31, 1920, and to exclude from the expenditure the interest charges on the board's debt paid in the said year—is good in law, then the board's rateable hereditament in the borough of St. Marylebone is correctly assessed at a gross value of 25,660*l.* and a rateable value of 19,362*l.*

Para. 10. The appellants contend :—

(1.) That the amount of the said precepts should be excluded from the calculation of the gross revenue.

(2.) If the amount of such precepts is included in the gross revenue that the interest charges on the said debt should also be included in the said expenditure.

(3.) That if any part of the moneys raised by the said precepts should be included in the gross revenue for the said year 488,139*l.* (being the amount actually received under the said precepts in the said year) and no more should be included.

The respondents admit that if any of these contentions is good in law then the gross value of the said hereditament should be 15,021*l.* and the rateable value thereof should be 8723*l.*

Para. 11. The question for the opinion of this Court is whether the contentions of the appellants set out in para. 10 hereof or either of such contentions is good in law or not.

Para. 12. If the Court should be of opinion that any of the appellant's contentions numbered (1.), (2.) and (3.) in para. 10 hereof is good in law then the said amount is to be reduced to 15,021*l.* gross and 8,723*l.* rateable, and if the Court should be of opinion that none of the said contentions is good in law then the said appeal is to be dismissed.

The appellant's third contention, set out in para. 10 (3.) of the special case, was abandoned during the argument.

Talbot K.C. and *S. O. Henn Collins* for the appellants. The amount of these precepts ought not to be included in

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the gross revenue of the appellants' undertaking for the purpose of assessment. They are landlord's charges. The revenue here consists chiefly of payments for the supply of water, that is to say, revenue which concerns the hypothetical tenant. The expenditure includes interest on capital charges, and this, since it would fall on the landlord alone, should be disregarded. It is immaterial so far as the tenant of a house is concerned whether the house is purchased out of the landlord's own moneys only or by means of borrowed money. The respondents by including the amount of the precepts have included as tenants' profits sums raised to meet expenditure by the landlord and not by the hypothetical tenant. *Dewsbury and Heckmondwike Waterworks Board* v. *Penistone Union Assessment Committee* (1) is distinguishable upon the facts and we do not dispute the principle laid down by the Court of Appeal in that case: the question whether the charges there in question concerned the landlord or the tenant was not fully considered by the Court.

In *Port of London Authority* v. *Orsett Union Assessment Committee* (2) Lord Buckmaster lays down the principle to be applied where there are statutory restrictions on the imposition of rents, as follows: "The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament." Those words are cited by Atkin L.J. in his judgment in *Roberts* v. *Poplar Assessment Committee.* (3) In *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (4) the claim that the dock company were entitled to an allowance for interest on their debt was abandoned in argument as untenable: the reason for this was presumably that the charge was not one for which the board were liable as hypothetical tenants, but as landlords. That case was overruled so far as it is an authority on the other side by the

(1) 16 Q. B. D. 585; 17 Q. B. D. 384.
(2) [1920] A. C. 273, 305.
(3) [1922] 1 K. B. 25.
(4) (1873) L. R. 9 Q. B. 84, 94.

House of Lords in *Port of London Authority* v. *Orsett Union Assessment Committee.* (1) In *Merthyr Tydfil Local Board of Health* v. *Merthyr Tydfil Assessment Committee* (2) the rating authorities sought to include in the rateable value of the waterworks a sum paid out of the general district rate for the purposes of the Local Water Act, and this sum was excluded by the Court on the ground that it was received by way of loan and was repayable. Vaughan Williams J. (as he then was) in his judgment suggests that if it were not so, money received by the hypothetical tenant must be included in the receipts for the purpose of calculation of profits: but that case is not here in point.

As to the second question there is a reductio ad absurdum. If the amount raised by the precepts is included upon the revenue side, the interest and capital charges, etc., should obviously be brought in also on the expenditure side of the account.

Disturnal K.C., *Konstam K.C.* and *Herbert Davey* for the respondents. The proper method of assessment is to ascertain what rent a hypothetical tenant would give, and for this purpose this assessment under which the amount of the precepts is included in the receipts is correct: *Dewsbury Case* (3), where Manisty J. said: "It is in our opinion immaterial from what source the income is derived, so long as it is incidental to the ownership of the property."

[AVORY J. Why are the amounts received under the precepts to be reckoned as sums which come out of the pocket of the hypothetical tenant?]

Because he has complete control over the Water Fund. This is not a question of apportionment as between productive and non-productive property, but as to the aggregate fund to be divided between the respective boroughs. For this purpose the total amount which the hypothetical tenant receives should be ascertained: from this sum, the expenses, the tenant's share of profit, cost of maintenance and renewal should be deducted and the remainder will be the rent payable

(1) [1920] A. C. 273. (2) [1891] 1 Q. B. 186.
(3) 16 Q. B. D. 585, 596.

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to the landlord. No question of "beneficial occupation" here arises as in the *Dewsbury Case* (1); that question was settled in *Reg.* v. *London School Board.* (2) Here the difference between the total revenue and expenditure is the only point to be considered.

[LORD HEWART C.J. The payments under the precepts here are of a kind made by the landlord and not by the tenant. Why should they be brought in at all ?]

In the case of railways and canals the method of assessment is to take on one side all receipts and on the other side the expenses, including interest on tenant's capital, and tenant's profits. The same rule is applicable here.

[AVORY J. The Court in the *Dewsbury Case* (3) appears to have overlooked the question whether the money was received by the board as landlord or as tenant; the case turned mainly on the question whether there was beneficial occupation. See the judgment of Manisty J. in that case.]

The appellants here are seeking to claim an allowance for interest on their debt, a point which was abandoned by the appellants in the *Mersey Docks Case.* (4) The tenant here receives the whole fund, whether from water rates or from the precepts: the balance, after paying working expenses, charges and profits, goes to the landlord, and whether it is distributed by him as interest or retained as rent is immaterial.

[LORD HEWART C.J. The appellants do not suggest that no attention is to be paid to the fact that the tenants might benefit from the right to issue precepts, but they say that in the present assessment the actual amounts which are received for landlord's purposes ought not to be included.]

We are dealing with agreed figures. Moreover in the *Merthyr Case* (5), if the loan there had not been repayable it would have been properly brought into the gross receipts, as is pointed out in the judgment of Vaughan Williams J. in that case.

Talbot K.C. in reply. The question is as to this particular

(1) 17 Q. B. D. 384.
(2) (1886) 17 Q. B. D. 738.
(3) 16 Q. B. D. 585, 596.
(4) L. R. 9 Q. B. 84, 94.
(5) [1891] 1 Q. B. 186, 192.

assessment. We admit that after the calculation is made on a correct basis, the figures being omitted, some allowance may be made in arriving at the rateable value for the fact that there is a statutory power to levy a rate; but that is not here asked. That is a matter for the Assessment Committee and should be calculated by allowing to the tenant less profit than would be the case if he had to bear the loss as well as enjoy the profit. The *Dewsbury Case* (1) only decides that if such an allowance is made, the Committee have not erred in law. The sums here in question are not sums received by the appellants as tenants and must be dissected as between landlord and tenant. A comparison of revenue and expenditure is not the only basis of assessment: sometimes interest on landlord's expenditure must be taken as the basis of rent. The two methods must not be confused and the present case is not comparable with *Reg.* v. *London School Board* (2) or *London County Council* v. *Erith Overseers.* (3)

LORD HEWART C.J. This is a case stated, and if I may recapitulate, as shortly as I can, the material facts, it appears that the Metropolitan Water Board is occupier of a rateable hereditament in Marylebone consisting of land, water mains, pipes and other apparatus for the conveyance and supply of water. The question which arises is as to the true gross and rateable value of that hereditament. The board was aggrieved by the decision of the Assessment Committee of the borough and gave notice of appeal to the Court of quarter sessions claiming a reduction. Thereafter a case was stated pursuant to s. 40 of the Valuation (Metropolis) Act, 1869.

The question turns upon s. 15 of the Metropolis Water Act, 1902, considered in relation to the facts set out in the case. By that section it is provided (sub-s. 1): "There shall be established a water fund, and all receipts of the Water Board shall be carried to that fund, and all payments

(1) 16 Q. B. D. 585; 17 Q. B. D. 384.

(2) 17 Q. B. D. 738.

(3) [1893] A. C. 562.

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by the board shall be made out of that fund." (Sub-s. 2): "Any sum required to meet any deficiency in the water fund, whether for satisfying past or future liabilities, in any financial year, shall be apportioned" in the manner set out in that sub-section. By sub-s. 3: "The Water Board shall issue precepts for the sums apportioned to the City and the several boroughs and districts liable. . . . ." In the discussion of the question, What was the true rateable value of this hereditament? both sides adopted as the basis of assessment what is described in para. 6 of the case as "the balance of the revenue of the board over their expenditure for the year ending 31st March, 1920," that is to say for a particular financial year, and not the average figures computed over a series of years. With regard to that financial year, as appears from the schedule set out in the case, if a comparison is made between the revenue and the expenditure of the board, other than debt charges, there was a surplus revenue of 698,820*l.*, being the difference between 3,158,391*l.* and 2,459,571*l.*; but it happened that in the same year there was a total debt expenditure divisible under the two heads, interest charges and reduction of debt, amounting to 1,683,687*l.*, and accordingly precepts were issued in order to obtain a sum to make up that deficiency. It is quite obvious that the total debt expenditure was far more than the amount derived as revenue from the precepts, the total debt expenditure being 1,683,687*l.*, the revenue from precepts 488,139*l.*; and this fact also is obvious, that if the expenditure were considered apart from payment of debt charges the revenue was more than enough to satisfy that expenditure, and no need to apply the provisions of the Act as to the issuing of precepts would have arisen at all, inasmuch as there would have been no deficiency to meet. In that state of the facts the question began by being, What was the true rateable value of this hereditament? It is important to observe that the Metropolitan Water Board by the necessity of the case occupies at one and the same time the position of landlord and the position of tenant. The board is the owner of the undertaking, and in order to deal with

the problem under the Valuation (Metropolis) Act, 1869, that is to say in order to ascertain what is the rent that might be expected to be paid by the hypothetical tenant, a clear line must be drawn, as far as possible, between the obligations of the landlord on the one hand and the obligations of the tenant on the other hand. Now it is not denied that these payments for debt charges were payments of a kind which would fall upon the landlord. They are not payments in which the tenant is directly concerned. To reiterate an illustration which was referred to in the course of the argument, it matters not to the hypothetical tenant whether the hereditament has been paid for out and out by the landlord, or whether the landlord is under an obligation to pay interest year by year upon loans which he has raised in order to pay the purchase price. From the point of view of the tenant those matters are irrelevant, and in substance, therefore, it appears that if what is considered on the one side is revenue such as the tenant would receive, and on the other side expenditure such as the tenant would pay, there was a clear surplus in the year deliberately chosen for the purpose of ascertaining the basis of revenue over expenditure; but by reason of the large amount of the landlord's charges which had to be paid or were paid during that year there arose a deficiency, and because of that deficiency brought about in that way and not in any other way it became necessary to raise a further sum by the issuing of precepts to the various authorities. In those circumstances the Assessment Committee, for the purpose of arriving at the basis of the assessment, included as part of the revenue of the board for the year the amount of the precepts issued by the board in respect of the said year under the provisions of s. 15 of the Act of 1902, and excluded from the expenditure of the board the amount of the interest charges on the debt referred to in para. 8—various charges, "capital charges—namely, interest on expenditure in connection with the acquisition of their undertaking and interest and sinking fund contributions on the board's capital expenditure since the acquisition of their undertaking." In other words, as the

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appellants contend, upon the revenue side of the account the respondents include a sum of money received in order to meet the deficiency caused by the payment of landlord's charges, while at the same time upon the expenditure side of the account the Assessment Committee exclude the landlord's charges which had brought about that deficiency and caused that revenue to be collected. The contention of the appellants in the first instance was that in those circumstances upon the facts of that year the amount of the precepts ought to be excluded from the calculation of the gross revenue. There followed what seemed to be—and Mr. Talbot, I think, rather accepts that view of it—a reductio ad absurdum; in the alternative, according to the second contention of the appellants, "if the amount of such precepts is included in the gross revenue the interest charges on the said debt should also be included in the said expenditure."

Now attention has been directed in the course of the argument to a case decided some twenty-seven years ago—namely, the case of *Dewsbury and Heckmondwike Waterworks Board* v. *Penistone Union Assessment Committee.* (1) It is to be observed that in that case the contention on behalf of the appellants, as appears from the report of the case in the Court below, was that there was no beneficial occupation at all. The facts, although they bear a certain resemblance to the facts in this case, were not by any means identical with them, nor was the point which has been the chief point of argument to-day explored in the *Dewsbury Case.* There is a passage in the judgment in the divisional Court which shows to how slight an extent was the question which has been considered here to-day really considered by the divisional Court in that case. Manisty J. in giving judgment said: "We are clearly of opinion that the property in the present case is capable of being beneficially occupied, and that consequently it is rateable. We are also of opinion that the amount collected by means of the water rate ought to be taken into account in ascertaining the net rateable value of the property. It is in our opinion

(1) 16 Q. B. D. 585, 596, (C. A.) 17 Q. B. D. 384.

immaterial from what source the income is derived, so long as it is incidental to the ownership of the property." It is difficult to suppose that that word "ownership" would have been used if the questions which this Court has just been considering had been explored in the argument in that case. That case went to the Court of Appeal, and one cannot help observing how comparatively limited was the ground covered, and intended to be covered, by the judgment in the Court of Appeal. It is quite true, if one looks at the headnote in the report in the Court of Appeal, it was held "that in assessing the appellants to the poor rate in respect of their reservoirs, pipes and works, the amount collected by means of a water rate ought to be taken into account." That is in form a general proposition, and the word "amount" clearly seems to refer to the actual figure. Lord Esher M.R., however, in giving judgment employed no such word. (1) He said upon that part of the case: "The question is whether that power of obtaining the water rate in aid ought to be taken into account in estimating the annual value of the appellants' property"; and a little lower he says: "Then the question is this, is it an advantage to a man to hold land upon these terms, namely, that, if there is a deficiency in the rents which he can obtain in any one year, he has a right to have that deficiency made up by a rate, but, if in any one year the rents which he obtains are more than his expenses, then he has the advantage of the profits? Of course it is a great advantage to a tenant that he can never lose in any one year, while in other years he may gain, and that advantage must be taken into account in estimating the rent which he would give for the land if he were placed in the same position as the actual owner. That is the true principle, and we are only asked to lay down the principle." Those words seem clearly to say that this is not a question dependent upon the very figures of a particular calculation; it is a question raising a principle. There is the principle clearly laid down that the power of obtaining money by means of a rate in order to meet a deficiency, the advantage of being in that

(1) 17 Q. B. D. 384, 387.

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position under statute, is something which is to be taken into account. One turns from that case to *Merthyr Tydfil Local Board of Health* v. *Merthyr Tydfil Union Assessment Committee* (1), where there was a different statutory provision, which, however, enabled moneys to be obtained as the result of the rate; but it was held in that case that the sum obtained by the rate ought not to be included in the assessment. Why not? Because it was raised on terms as to repayment which prevented it from being available as an item of gross profits. Vaughan Williams J. (as he then was) in giving judgment, said: "The only essential is, the money so received should be money potentially available to the hypothetical tenant as an item of gross profits. It is because the 5680*l.*"—which was the sum in question there —" was not so available to the hypothetical tenant, being appropriated to the repayment of capital expenditure, and therefore received by the appellants not as hypothetical tenants but as landlords, that this sum is properly by common consent not included in the receipts of the hypothetical tenant for the purpose of arriving at the annual value. But although it may be conceded that when once money has been received or is receivable by the hypothetical tenant as such tenant, it must be included in the receipts for the purpose of the calculation of his anticipated profits, even though the profits when earned may be appropriated in the hands of the tenant to the liquidation of debts which are not his as hypothetical tenant, as was held in the *Dewsbury Case*, yet the money must have been received by the tenant under conditions that make it potentially available to him as an item of gross profit."

That case illustrates the difference between the circumstances which may arise. The statutory provision may be such that the hypothetical tenant could not in any circumstances derive benefit from the proceeds of the rate. On the other hand, the statutory provision may be such that in some circumstances the hypothetical tenant might derive advantage from the proceeds of the rate; and again

(1) [1891] 1 Q. B. 186, 192.

the facts of the particular case may be such that in the events which actually happened the true measure of the advantage or the power, as Lord Esher calls it, is the very sum of money which in the year under review was in fact obtained by the rate. Yet there may be another case where, notwithstanding that so far as statutory provisions are concerned circumstances might arise in which the hypothetical tenant might have a real advantage from this power, nevertheless in fact in the particular year there was no advantage of substance, and the true measure of the enhancement, if that is the right word, attributable to the statutory power, is practically nil. Now in the present case the contention of the appellants was that upon the history of the year under review, upon the facts and figures of that year, the proceeds of the rate ought to be omitted from the calculation of the gross revenue. It is quite evident that confusion has arisen in the past between the ambiguous meanings of the word "account." "To take into account" in the sense of including figures in a mathematical calculation is one thing; "to take into account" in the sense of paying attention to a matter in the course of an intellectual process is quite another thing. What was being contended for here by the respondents was not, in the words of Lord Esher, that the power of obtaining a rate or the advantage of obtaining a rate in particular circumstances was a matter to which attention should be paid; the contention of the respondents was that the actual figures showing the yield of the rates in these years should be brought into the arithmetical calculation of balance of revenue and expenditure under the heading of revenue, notwithstanding that the facts show that the deficiency was caused by landlords' charges and the money went to meet landlords' charges. The appellants say, on the other hand, that in those circumstances and for the purposes of that arithmetical calculation the amount of the precepts ought to be excluded; and in my opinion upon those facts the contention was correct. That does not in the least detract from the view that in a proper case that which would otherwise be the rateable value may properly

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be increased by the addition of some appropriate percentage, by reason of the fact that there is a statutory power to raise a rate for the purpose of meeting a deficiency. That is a question which in a proper case may give rise to a controversy of fact; but here the question of law is whether for the purposes of the arithmetical sum the appellants were right in their contention that in the events which happened in the year under review the amount of the precepts ought to be excluded from the calculation of the gross revenue. In my opinion that contention was right, and that being so, in the way in which this case has been stated, the amount is to be reduced to 15,021*l.* gross and 8723*l.* rateable.

AVORY J. I agree that this appeal should be allowed. The decisions on this subject make it more and more difficult to ascertain the rent that might be expected to be paid by the hypothetical tenant, and if this case had stated as the question for the Court, "On what general principles should the Water Board be rated?" it might have been more difficult to answer it. Having regard to the form in which the case is stated, there appears to me no difficulty in answering that the appellants' contention should prevail, because para. 12 of the case says, "If the Court should be of opinion that any of the Appellants' contentions numbered 1, 2 and 3 is good in law," then the amount is to be reduced to the figure which my Lord has mentioned. It appears to me that it might have been a difficult matter for decision whether on the hypothesis that this undertaking was let to a tenant the right to issue the precepts under s. 15 of the Metropolis Water Act, 1902, to make up any deficiency in the water fund would pass to the hypothetical tenant or would remain in the hands of the landlord. My impression is that, if one can really contemplate a transaction which is not contemplated at all by the Act of Parliament—namely, of this undertaking being let by the water board either to itself as tenant or to some water company—in all probability this right to issue precepts to make up the deficiency would be one which would remain in the hands of the landlord,

and if that were so then the answer to the first question, whether the amount of the precept should be excluded from the calculation, would be obvious. It would be obvious that that amount should be so excluded. But, without determining that point, assuming for the moment that the right to issue the precepts remains in the hands of the hypothetical tenant, I entirely agree with the conclusion at which my Lord has arrived—namely, that in this particular year, dealing with the figures for 1920, the hypothetical tenant would have no reason for resorting to this right to issue precepts, because there would be no deficiency in the hands of the tenant which he would have to make good by the issue of any such precept. Therefore upon the facts for that particular year it is clear in my opinion that the amount of those precepts should be excluded from the calculation of the gross revenue. Apart from that point, it being stated in the case that for the purpose of arriving at the rateable value the respondents here have excluded from the expenditure of the hypothetical tenant the amount of the interest charges on the debt referred to in para. 8, it appears to me to follow that the second contention of the appellants is good. The second contention is: "If the amount of such precepts is included in the gross revenue that the interest charges on the said debt should also be included in the said expenditure"; now having regard to the fact that these precepts which were issued were for the purpose only in that year of meeting a deficiency arising from charges which are obviously landlords' expenses—namely, redemption of debt and charges for interest—I think it follows as a matter of logic that if the amount of the precepts is included in the receipts, then the amount of the interest charges on the debt should also be included in the expenditure.

I need not add anything to what my Lord has said with regard to the *Dewsbury* and the *Merthyr Tydfil Cases*. I think it is clear that the point which has arisen for decision in this case was not intended at all events to be decided in the *Dewsbury Case*, and it may be that in the *Merthyr Tydfil Case*, although the point was there decided, the facts of that

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case were different and make it inapplicable to the present case. There is one other word I have to say with regard to the *Mersey Docks Case.* (1) The appellants have relied upon what was said by Lord Blackburn in that case with regard to the question of interest on the debt. The respondents have severely criticised that argument and say that really what was said by Lord Blackburn was in their favour and not in favour of the appellants. I do not agree. Although it may be that the great authority of Lord Blackburn on this particular subject has been slightly impaired by the fact that his decision in that case on one point is overruled by the recent decision in the House of Lords in *Port of London Authority* v. *Orsett Union Assessment Committee* (2), no one has suggested that the point which Mr. Manisty gave up in the *Mersey Docks Case* during the argument as being untenable was not correctly decided by Lord Blackburn when he said: "The third question is whether the Appellants are entitled to any, and what, allowance in respect of interest on their debt. . . . . We answer that question in the negative." Lord Blackburn, in saying that, was dealing with the question whether the appellants qua tenants were entitled to a reduction in respect of interest on their debt, and in saying that qua tenants they were not entitled to make that deduction he was giving support to the contention in this case that qua tenants the Metropolitan Water Board are not to be supposed to be paying the interest on the debt. For these reasons I agree that the appeal should be allowed.

SANKEY J. I agree. I only wish to add a few words on the legal position. In my view the *Dewsbury Case* laid down a principle and held that that principle had been applied to the particular facts under discussion. I doubt if the headnote to the *Dewsbury Case* in the report of the case in the Court of Appeal is correct. (3) The real question decided was the question postulated by Lord Esher M.R., where he says: "The question is whether that power of obtaining

(1) L. R. 9 Q. B. 84. (2) [1920] A. C. 273.
(3) 17 Q. B. D. 384, 387.

the water rate in aid ought to be taken into account in estimating the annual value of the appellants' property." A good deal of the confusion in this class of case has arisen from the fact that in the discussions upon them the word "account" has been used in two different meanings, but the learned Master of the Rolls shows quite clearly the sense in which he uses it. He says: "Of course it is a great advantage to a tenant that he can never lose in any one year, while in other years he may gain, and that advantage must be taken into account"—not "the account"—"in estimating the rent which he would give for the land if he were placed in the same position as the actual owner. That is the true principle, and we are only asked to lay down the principle." In other words, it is an advantage which must be taken into consideration,—I prefer the word "consideration" to the word "account,"—but you cannot say as a matter of law that the actual amount received from such a rate must be one of the figures placed in the gross revenue account. A sum equal to the amount or even less than the amount may be the true value of the advantage in some cases; it may not be in others. Again in a particular hereditament the value of the advantage may vary from year to year. On the facts of the *Dewsbury Case* such amount was held to be the proper value of the advantage to be placed in the gross revenue account, but the way in which the present case is stated is peculiar. Para. 12 is as follows: "If the Court should be of opinion that any of the appellants' contentions numbered (1.), (2.) and (3.) in para. 10 hereof is good in law then the said amount is to be reduced to 15,021*l.* gross and 8723*l.* rateable." The appellants are right on the first of their contentions—namely, that the "amount of the said precepts should be excluded from the calculation of the gross revenue"—and for this reason I am of opinion that the appeal succeeds.

Appeal allowed.

Solicitor for appellants: *Walter Moon.*

Solicitors for respondents: *Sharpe, Pritchard & Co.*

F. P. F.

C. C. A.
1922
Oct. 30.

[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* REDD.

Criminal Law—Evidence—Statement voluntarily made by Witness as to Appellant's good Character—Admissibility of Cross-examination as to bad Character—Criminal Evidence Act, 1898 (61 *&* 62 *Vict. c.* 36), *s.* 1—*Criminal Appeal Act,* 1907 (7 *Edw.* 7, *c.* 23), *s.* 4, *proviso.*

An appellant, who was tried for housebreaking and robbery, called a witness for the purpose of producing certain letters. This witness, without any question being put to him by the appellant, voluntarily made a statement as to the appellant's good character. The counsel for the prosecution then claimed that as evidence of the appellant's good character had been given he was entitled to cross-examine the witness as to the appellant's real character, and he thereupon proceeded to ask the witness as to the number of times the appellant had been convicted :—

Held, that the appellant was not under the circumstances endeavouring to establish a good character by calling a witness who voluntarily made a statement as to the appellant's good character, and that therefore the questions as to the appellant's previous convictions were not admissible.

Held, further, that as the Court could not say that the jury must necessarily have convicted the appellant if the improper questions had not been put, the proviso to s. 4 of the Criminal Appeal Act, 1907, could not be applied; and that it was not sufficient that the jury might have convicted the appellant, and the conviction must therefore be quashed.

Rule in *Reg.* v. *Gadbury* (1838) 8 C. & P. 676 applied.

APPEAL from a conviction.

The appellant was tried at the Northamptonshire Quarter Sessions upon a charge of breaking and entering a dwelling house at East Haddon and stealing therefrom the sum of about 140*l.*, the property of Agnes Weston, who was the grandmother of the appellant's wife. The appellant was also charged with receiving the property stolen. He was convicted upon the whole indictment and sentenced to seven years' penal servitude.

In the course of the trial the appellant, who was undefended, called a witness named Williams for the sole purpose of producing certain letters. That witness, without any question being asked by the appellant, voluntarily made a statement that the appellant held a good position in the

Army as a warrant officer and that so far as the witness knew he was quite all right. The counsel for the prosecution then said that as evidence had been given of the good character of the appellant he proposed to cross-examine the witness as to the real character of the appellant. He then proceeded to ask the witness whether he was aware that the appellant had been convicted eleven times, including two convictions in which the appellant had been sentenced to terms of penal servitude. The witness replied that he was not aware of that fact. No attempt was made by the prosecution to prove the previous convictions of the appellant, nor was any further reference to them made to the jury.

The appellant also gave evidence on his own behalf, but did not give evidence of his own good character. He was, however, asked in cross-examination by counsel for the prosecution as to the number of times he had deserted from the Army.

C. K. Tatham for the appellant. Counsel for the prosecution was not entitled to cross-examine the witness Williams as to the previous convictions of the appellant merely because Williams voluntarily made a statement as to the appellant's good character. Williams was not called by the appellant as a witness to character. A statement as to a prisoner's good character made voluntarily by a witness called for the defence does not entitle the prosecution to give evidence as to the prisoner's character. In *Reg.* v. *Gadbury* (1) a question was put in cross-examination by the prisoner's counsel, but as there was some doubt as to whether or not the object in putting it was to show the prisoner had borne a good character Parke B. would not allow evidence of a previous conviction to be given in the first instance. That was a stronger case than the present, because there the question as to good character was asked by the prisoner's counsel, whereas in the present case the statement was made voluntarily by a witness. The rule in that case is correctly stated in Archbold's Criminal Pleading, 26th ed., p. 366.

(1) 8 C. & P. 676.

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The Criminal Evidence Act, 1898, does not apply, because that only provides that a prisoner shall not be asked questions as to his character and does not refer to the evidence given by another witness. If the questions as to the appellant's previous conviction had not been asked the jury would probably not have convicted, as the evidence against him was very weak—at any rate it is impossible to say that the jury must necessarily have convicted, therefore the Court ought not to apply the proviso to s. 4 of the Criminal Appeal Act, 1907.

Bernard Campion for the Crown. The questions put to the witness Williams as to the appellant's previous convictions were technically admissible, as evidence of the appellant's good character had been given, although it was not desirable that they should have been put. As soon as evidence as to a prisoner's good character is given before a jury, even though the evidence is given voluntarily by a witness called on behalf of the prisoner without any questions being asked by the prisoner, it is open to the prosecution to rebut that evidence, whether the evidence as to character is given intentionally or unintentionally. Even if the questions as to the appellant's previous convictions ought not to have been put, nevertheless the remainder of the evidence against the appellant was such that the jury must inevitably have convicted him, and therefore the Court ought in accordance with the proviso to s. 4 of the Criminal Appeal Act, 1907, to dismiss the appeal.

The judgment of the Court (Lord Hewart C.J., Avory and Sankey JJ.) was delivered by

AVORY J. The question we have to determine is whether the suggestion of the previous bad character of the appellant was properly put before the jury. So far as the evidence given by the witness Williams is concerned the Criminal Evidence Act, 1898, has no application, but it does fall within the authority of *Reg.* v. *Gadbury.* (1) In the opinion of the Court the rule in that case is correctly stated in

(1) 8 C. & P. 676.

Archbold's Criminal Pleading, 26th ed., p. 366, as follows: "If the prisoner endeavours to establish a good character, either by calling witnesses himself, or by cross-examining the witnesses for the prosecution, the prosecution is at liberty, in most cases, to give proof of the prisoner's previous convictions." The question is whether the appellant was within the meaning of that rule endeavouring to establish a good character. In the opinion of the Court he was not endeavouring to establish a good character merely because a witness whom he called, voluntarily and probably against the appellant's own desire, made a statement as to the appellant's good character, and therefore the questions put to that witness in cross-examination by counsel for the prosecution were not admissible.

The matter does not stop there, because the appellant gave evidence on his own behalf, and he was cross-examined by counsel for the prosecution as to the number of times he had deserted from the Army, and he gave an answer which would convey to the jury that there was some truth in the question. The question put to the appellant in cross-examination as to his desertion from the Army does come directly within the provisions of the Criminal Evidence Act, 1898. That Act provides in s. 1 (*f*) that "a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . . (ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character. . . . ." In the opinion of the Court the appellant had not given evidence of good character within the meaning of the Act and therefore the cross-examination as to the appellant's desertion from the Army was not admissible.

Having come to that conclusion we have now to consider whether this is a case in which the proviso to s. 4 of the Criminal Appeal Act, 1907, should be applied. It has been

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frequently laid down that that proviso can only be applied if the Court comes to the conclusion that the jury must necessarily have come to the same conclusion even if the improper questions had not been put. It was so laid down by Lord Alverstone C.J. in *Rex* v. *Hemingway*. (1) In that case the deputy-chairman at the London Sessions, intending to assist the prisoner, who was undefended, asked a question with a view of showing that his character was good, which elicited the fact that the appellant had been previously convicted. He directed the jury to disregard that fact, but the jury convicted the prisoner. Lord Alverstone C.J. in the course of his judgment said: "Unfortunately, in attempting to assist the prisoner, the judge quite innocently elicited the fact that the appellant had been previously convicted. It has been frequently decided that, except in certain circumstances which do not arise in this case, evidence of previous convictions must not be given against a prisoner, and this information ought not to have been before the jury. We cannot assume, though it may possibly be the case, that the appellant so conducted his case as to show that he was an expert in criminal law. In a case where the evidence was slight, the knowledge of a previous conviction may have influenced the jury. It is better that a guilty person should escape than that an innocent one should be convicted. This conviction will be quashed."

Lord Reading C.J. also in *Rex* v. *Ratcliffe* (2), which was a similar case where evidence had been improperly admitted, said this (3): "Now counsel for the Crown relies on the proviso to s. 4 of the Criminal Appeal Act, 1907, and argues that notwithstanding the irregularity, no substantial miscarriage of justice has actually occurred. We are unable to arrive at that conclusion. We cannot say that we are satisfied that assuming that the improper questions had not been put, the jury would nevertheless have been bound to come to the same conclusion. The principle has been often laid down that the fact that the jury might have convicted

(1) (1912) 8 Cr. App. R. 47, 48.
(2) (1919) 14 Cr. App. R. 95.
(3) Ibid. 99.

is not sufficient to justify us in applying the proviso. Having regard to the circumstances of this case, we cannot say that the jury were bound to convict if these questions had not been put to the appellant. For these reasons the conviction must be quashed."

In the present case no doubt there was substantial evidence upon which the jury might have convicted the appellant apart from this evidence. If however the Court comes to the conclusion that the jury might have entertained a doubt as to the guilt of the appellant if this evidence had not been given it is sufficient to prevent the proviso to s. 4 being applied. Having regard to the fact that the appellant's wife was the person whom her grandmother, the prosecutrix, suspected of committing the robbery, and also to the fact that she had robbed her grandmother many times before, the jury might well have entertained a doubt as to whether the appellant had committed the robbery, notwithstanding that the appellant's wife gave most damning evidence against him to the effect that when he left her shortly before the robbery he said that he was going to her home to take what her grandmother had got. The jury might perhaps have convicted the appellant of receiving, but they in fact convicted him upon the whole indictment. The Court are not prepared to say that the jury must necessarily have convicted the appellant if these improper questions had not been put. It is impossible to suppose that the jury were not influenced by the questions put to the witness Williams as to the previous convictions of the appellant, even though the witness did not assent to the questions, as the jury would assume that such questions would not be put unless the facts were as was suggested. The appeal must therefore be allowed and the conviction quashed.

Appeal allowed; Conviction quashed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for Crown: *Director of Public Prosecutions.*

R. F. S.

1922
June 26.

HOWARD HOULDER AND PARTNERS, LIMITED *v.* MANX ISLES STEAMSHIP COMPANY, LIMITED.

[1922. H. 487.]

Principal and Agent—Shipbroker—Remuneration—Negotiation of Charterparty—Option to Charterers to purchase Ship at named Price—Commission Note for Brokerage on that Price—Purchase at a smaller Price—Right of Broker to Brokerage on actual Price—Quantum meruit.

The plaintiffs, who were shipbrokers, negotiated on behalf of the defendants, the owners of a steamship, a charterparty of the steamship which was to be in force from October, 1920, for five years, and which contained a clause providing that the charterers should have the option of purchasing the steamship at any time between the signing of the charter and the completion of the charter period for 125,000*l.* On the day when the charterparty was signed the defendants signed and gave to the plaintiffs a commission note in these terms: "We hereby agree to pay you . . . . 5 per cent. brokerage on hire. . . . . Should the option of purchase contained in the charter be availed of, the brokerage on purchase to be 3½ per cent. . . . ." The charterparty was acted upon until June, 1921, when the defendants sold the steamship to the charterers for 65,000*l.* The plaintiffs brought an action against the defendants, claiming (inter alia) 3½ per cent. commission on 65,000*l.*, the price paid by the charterers for the steamship; and, in the alternative, a quantum meruit for their alleged services in effecting the same:—

Held, first, that the former of these claims failed, the option of purchase mentioned in the commission note never having been exercised, and the sale effected being a sale at a different price from that upon which alone the brokerage of 3½ per cent. was to become payable; and, secondly, that the latter claim also failed inasmuch as, the parties having reduced their bargain into writing in the commission note, there was no scope for the operation of the principle of quantum meruit.

Action tried by McCardie J. without a jury.

The following statement of facts is taken substantially from the judgment of the learned Judge.

Messrs. Howard Houlder & Partners, Ld., the plaintiffs, were steamship agents and brokers, and the Manx Isles Steamship Co., Ld., the defendants, were the owners of a steamship called the *Manx Isles.*

In 1913 the plaintiffs effected on behalf of the defendants a charter of the vessel for seven years, and for this service the defendants paid them commission. The period of that charter would expire about October, 1920.

In the autumn of 1919, the plaintiffs began an active negotiation between the defendants and the British Molasses Co., Ld., of Liverpool, which was associated in business with the former charterers for a fresh charterparty to begin when the former ended. The first proposals related to a suggested purchase of the vessel by the limited company. Much discussion took place about price. Then the question turned to a proposal for a fresh charterparty for a long period. Discussion occurred on the terms. Terms were eventually agreed and the arrangements were embodied in a charterparty between the defendants of the one part and the limited company of the other part.

The charter was signed on or about January 8, 1920. It was dated December 23, 1919. It was for five years from the expiration of the 1913 charter. The monthly hire was 4750*l.* The following was the clause as to purchase:—"Charterers have option of purchasing steamer at any time between the date of signing charter and the completion of charter period for the sum of 125,000*l.* without oil burning installation, but if such installation has in the meantime been fitted charterers are to pay cost of fitting same less a reasonable amount for depreciation."

The plaintiffs took a very active and effective part in bringing about the above bargain. Before the charterparty was signed, on January 8, 1920, the plaintiffs and the defendants had discussed the question of the plaintiffs' remuneration. No agreement was then arrived at. On the day, however, when the charterparty was signed, the defendants signed and gave to the plaintiffs a commission note which was made of like date as the charterparty, namely, December 23, 1919. It represented the bargain between the plaintiffs and the defendants as to the plaintiffs' reward. It is the document set forth in the statement of claim. It is as follows:—"December 23, 1919. Dear Sirs,—S.S. *Manx Isles.* We hereby agree to pay to you under the five years charter completed to-day per above steamer with the British Molasses Company, Limited, Liverpool, 5 per cent. brokerage on hire as earned and paid. Should the option of purchase contained

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in the charter be availed of, the brokerage on purchase to be 3½ per cent., payable on the final completion of purchase.—Yours truly, Lowden, Connell & Co."

For about eight months after it came into operation the charterparty was duly fulfilled. Hire was paid to the defendants, and on this hire the plaintiffs received their commission as bargained.

At the beginning of July, 1921, the defendants sold to the charterers the *Manx Isles* for 65,000*l.* Thus the charterparty ceased to exist. The plaintiff then made certain claims on the defendants for commission which the defendants declined to recognize.

The plaintiffs thereupon brought the present action against the defendants. In their statement of claim the plaintiffs set out several distinct heads of demand. First, they claimed against the defendants that they deprived them of their future commission by selling the vessel to the charterers. Under this head they asked for 5 per cent. on the total hire which would have been earned. The total was 247,000*l.* Thus they claimed 12,350*l.* Secondly, they claimed (alternatively) 3½ per cent. (the rate named in the commission note) on 65,000*l.*, the price given by the charterers for the vessel. Thirdly, they claimed (alternatively) a reasonable remuneration as on a quantum meruit for their services as above indicated and which they asserted to have resulted in the sale of the vessel for 65,000*l.*

The defendants in their defence denied liability.

Jowitt K.C. and *H. Claughton Scott* for the plaintiffs.
Neilson K.C. and *P. Vos* for the defendants.

McCARDIE J. read a judgment in which, after stating the facts and the heads of claim substantially as above set out, he continued as follows: The first head of claim must, of course, fail. It is met by the decision of the House of Lords in *French & Co.* v. *Leeston Shipping Co.* (1) I do not propose to inquire whether that opinion be consonant with various

(1) [1922] 1 A. C. 451.

weighty decisions which will be familiar to those who have had to consider this branch of law, but which were not cited to the House of Lords. Nor is it necessary to consider here the limits which legal principle may impose as to the operative extent of the conclusion reached by the House of Lords on the particular circumstances of *French's Case*. It will suffice to say that the facts of this present litigation are so similar to those in the House of Lords case as to defeat the first head of the plaintiffs' claim. The writ was here issued before the House of Lords had announced their opinion in *French's Case*. It must be taken that there was nothing in law to prevent the defendants from selling the ship, although the result was that the plaintiffs lost any chance of earning further commission under the terms of the commission note. In view of the dictum of Lord Dunedin in *French & Co.* v. *Leeston Shipping Co.* (1), I may add that there is here no evidence and no suggestion that the defendants sold the vessel to the charterers in order to escape the payment of commission to the plaintiffs in respect of the charter hire. That dictum of Lord Dunedin may call for consideration in some other case. I express no opinion upon it.

I must now consider the second and third heads under which the plaintiffs formulate their case. I think that so far as the plaintiffs seek to rely on the commission note they must fail. The words of the note are: "Should the option of purchase contained in the charter be availed of, the brokerage on purchase to be 3½ per cent., payable on the final completion of purchase." The option of purchase in the charter was an option to purchase pursuant to express terms which fixed the price at 125,000*l.* That option was never exercised. The owners and the charterers made a wholly distinct bargain whereby the charterers bought at 65,000*l.* only. The plaintiffs took no part in negotiating this fresh bargain, which was made when shipping conditions had greatly changed and vessels had heavily fallen in value. It is a settled rule for the construction of commission notes and the like documents which refer to the remuneration of an agent that a plaintiff cannot

(1) [1922] 1 A. C. 455.

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recover unless he shows that the conditions of the written bargain have been fulfilled. If he proves fulfilment he recovers. If not, he fails. There appears to be no halfway house, and it matters not that the plaintiff proves expenditure of time, money and skill. This rule is well illustrated by *Alder* v. *Boyle* (1) (where commission was not payable until an abstract of conveyance was drawn out); *Bull* v. *Price* (2) (where the commission was only payable on money actually "obtained"); *Battams* v. *Tompkins* (3) (commission payable on "completion" of purchase); *Clack* v. *Wood* (4) (commission payable "subject to the title being approved by my solicitor"), and by such illustrative decisions as *Mason* v. *Clifton* (5) (commission to be paid if money is raised on specified terms), and *Martin* v. *Tucker* (6) (commission to be paid on "the amount of the capital brought into the business"). It therefore seems clear that the plaintiffs cannot recover upon the actual terms of the commission note. I may add that it may well be that an owner would be willing to pay 3½ per cent. if he sold his ship for 125,000*l.*, but exceedingly unwilling to do so if he sold at 65,000*l.* only.

Mr. Jowitt, however, rested his able and ingenious argument for the plaintiffs not so much on the actual terms of the commission note as upon the suggested right of the plaintiffs to recover upon a quantum meruit for services performed and resulting (so it is said) either directly or indirectly in the sale for 65,000*l.* of the vessel. This point calls for attention, inasmuch as it raises a question of interest and importance to all agents who rely on the payment of commission as their means of income. I must point out that the commission note before me represented the result of discussion between the plaintiffs and the defendants. It embodied their bargain. They reduced their agreement to writing. There was no collateral arrangement whatsoever. The rights of the plaintiffs are to be found in the commission note alone, and so the parties intended. If this be so, then it follows, as

(1) (1847) 4 C. B. 635.
(2) (1831) 7 Bing. 237.
(3) (1892) 8 Times L. R. 707.
(4) (1882) 9 Q. B. D. 276.
(5) (1863) 3 F. & F. 899, 901.
(6) (1885) 1 Times L. R. 655.

Mr. Neilson so forcibly indicated for the defendants, that the rule "Expressum facit cessare tacitum" here applies. There is no scope on the present facts for the operation of the quantum meruit principle. If I were to rule in the plaintiffs' favour, I should ignore the well established rule and a substantial body of authoritative decision. In *Mason* v. *Clifton* (1) Cockburn C.J., when summing up to the jury, said: "If . . . . B is employed to procure money upon certain terms, and does not procure it upon those terms, but upon other and different terms, then A will not be liable to him for commission. Nor can B, in such case, claim to recover a reasonable remuneration for trouble and labour; for he has not done what he was employed to do." So, too, in *Green* v. *Mules* (2) Willes J., in speaking of the commission agreement there in question, said (3): "The substance of the matter was, 'If the letter is effectual, I (the defendant) will pay you 100*l.* though not liable; if it is not effectual, I will pay you nothing.'" These cases will illustrate the "Expressum facit cessare tacitum" rule, though that rule was not expressly mentioned in them. The matter was clearly put in *Martin* v. *Tucker* (4) in the judgment of Lord Coleridge C.J., when he said that the plaintiffs "could not claim on a quantum meruit because they had chosen to tie themselves down by the express terms of the agreement." Much the same view was expressed by the Court of Appeal in *Barnett* v. *Isaacson* (5), where Lord Esher M.R. said that the plaintiff was only to be paid in case of success, no matter what labour and trouble he had devoted to the matter. Finally, I may mention *Lott* v. *Outhwaite* (6), where Lindley L.J. stated: "It was said that there was an implied contract to pay the agent a quantum meruit for his services. The answer was that there could be no implied contract when there was an express contract." The authorities cited in Smith's Leading Cases, 12th ed., vol. ii., p. 24, and following, do not, I think, assist the plaintiffs. The point in favour of the

(1) (1863) 3 F. & F. 899, 901.
(2) (1861) 30 L. J. (C. P.) 343.
(3) Ibid. 345.
(4) (1885) 1 Times L. R. 655.
(5) (1888) 4 Times L. R. 645.
(6) (1893) 10 Times L. R. 76.

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defendants is clearly and correctly set forth in Halsbury's Laws of England, vol. i, p. 193. For these reasons I must hold that the plaintiffs cannot recover upon a quantum meruit.

It therefore is not strictly needed that I should inquire whether the plaintiffs were the "efficient cause" of the sale of the vessel for 65,000*l.* As, however, the question was argued before me, I briefly express my opinion. Bearing in mind *Toulmin* v. *Millar* (1), and applying the tests laid down in *Millar* v. *Radford* (2) and in *Nightingale* v. *Parsons* (3), I should hold that the plaintiffs were not the "efficient cause" in bringing about the sale of the vessel for 65,000*l.* They took no part whatsoever (as I have said) in the independent negotiation which led to that result and the sale was made under conditions and in view of circumstances wholly distinct from those contemplated by the option clause in the charter of December 23, 1919.

I must therefore give judgment for the defendants.

Solicitors for plaintiffs: *William A. Crump & Son.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

(1) (1887) 12 App. Cas. 746; 58 L T. 96

(2) (1903) 19 Times L. R. 575.

(3) [1914] 2 K. B. 621.

J. R.

PARKINSON AND OTHERS *v.* NOEL.

1922
Oct. 18, 26.

[1922. P. 1902.]

Landlord and Tenant—Dwelling House—Tenant holding over on Expiration of Lease—Statutory Tenancy—Bankruptcy of Tenant—Disclaimer of Tenancy by Trustee in Bankruptcy—"Property" passing to Trustee—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 5, 15—*Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 167.

A statutory tenancy under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is "property" of the tenant within the meaning of s. 167 of the Bankruptcy Act, 1914.

The plaintiffs, having let to the defendant a dwelling house to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied, the defendant retained possession of it after the expiration of the term under the provisions of that Act. The defendant was afterwards adjudicated bankrupt and the trustee in bankruptcy disclaimed any interest in the house. In an action by the plaintiffs against the defendant for possession of the house and mesne profits:—

Held, that the statutory tenancy to which the defendant became entitled under the Act of 1920 was "property" within the meaning of s. 167 of the Bankruptcy Act, 1914, and passed under s. 53 to his trustee in bankruptcy, that on disclaimer thereof by the trustee that interest in the premises ceased to exist and was no longer available for the benefit of the defendant, and consequently that the plaintiffs were entitled to judgment.

ACTION tried by Greer J. as a short cause under Order XIV., r. 8.

By a lease dated October 17, 1917, the plaintiffs, Parkinson and others, let to the defendant, Noel, the dwelling house, No. 10, The Crescent, Surbiton, for five years from March 25, 1917. The house was one to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied.

On March 25, 1922, the lease expired, but the tenant remained in possession, claiming to be entitled to do so under the Act.

On July 8 the defendant was adjudicated a bankrupt, and the trustee in bankruptcy disclaimed any interest in the premises.

On July 20 the plaintiffs brought this action against the defendant, claiming possession of the house and (by amendment) mesne profits.

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Hansell for the plaintiff.

E. Clements and *Eric Sachs* for the defendant. The defendant was entitled to retain possession under the Act of 1920, ss. 5 and 15.

Hansell in reply. The defendant's rights passed under the Bankruptcy Acts to his trustee in bankruptcy, and the trustee having disclaimed all rights in connection with the property, the defendant was a mere trespasser and was not entitled to the benefit of the Act: *Reeves* v. *Davies.* (1)

Oct. 26. GREER J. read the following judgment: This is a claim for possession of the messuage or tenement known as No. 10, The Crescent, Surbiton.

The sole defence relied upon is that the defendant is protected in his possession by the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. [His Lordship stated the facts and continued:]

Counsel for the defendant contended that he was entitled to retain possession by reason of the provisions of the Increase of Rent, &c. (Restrictions), Act, 1920, to which the plaintiffs' counsel replied by contending that the defendant's rights passed under the Bankruptcy Acts to the trustee in bankruptcy, and that the trustee having disclaimed all rights in connection with the property, the defendant was a mere trespasser and was not entitled to the benefit of the Act, and cited *Reeves* v. *Davies* (1) in support of his case.

It is clear that if the defendant's rights did not pass to the trustee in bankruptcy, he is entitled to retain possession under the provisions of the Act, and it is equally clear that if his rights passed to the trustee in bankruptcy, the Act affords him no protection: see *Reeves* v. *Davies* (1) already cited.

The facts of *Reeves* v. *Davies* (1) did not raise the question I have to decide in this case. There a tenancy by agreement vested in the trustee in bankruptcy and was disclaimed by him, and the case is no authority on the question whether what has been called the statutory tenancy vests on the

(1) [1921] 2 K. B. 486.

bankruptcy of the tenant in the trustee. The property which passes to the trustee under s. 53 of the Bankruptcy Act, 1914, and is divisible amongst the creditors is defined by s. 167 of the Act in these words: "'Property' includes money, goods, things in action, land, and every description of property, whether real or personal and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined."

In order to see whether the rights or privileges conferred on an ex-tenant by the Increase of Rent, &c. (Restrictions), Act, 1920, are within this definition it is necessary to refer to ss. 5 and 15 of that Act. It is impossible to read those sections without seeing that they involve an obligation on the part of the landlord to permit his ex-tenant's possession to continue, and by implication to confer on the ex-tenant a right to retain possession on the terms of the expired tenancy. It seems to me that the ex-tenant, who for convenience has been called the statutory tenant, has an interest or profit in the property, and the landlord is subject to an obligation in favour of the tenant. I think this interest, profit, or right to the obligation imposed on the landlord is property within the meaning of the Bankruptcy Act, that it passed on the bankruptcy of the defendant to the trustee, and on his disclaimer ceased to exist and was no longer available for the benefit of the defendant.

There are several ways in which a statutory tenant's rights under the Act of 1920 may be valuable or profitable, even if he does not wish to retain personal possession. He may sublet part of the premises, he may bargain with his landlord for some consideration for giving up possession: see s. 15, sub-s. 2.

Further, an executor who has never been in personal possession is entitled to the benefit of the Act: *Collis* v. *Flower*. (1) Though the Act in form appears to be chiefly directed to restricting the power of the Court to adjudge possession to a

(1) [1921] 1 K. B. 409.

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plaintiff lessor, it is available for the protection of a statutory tenant whose landlord has entered the premises during the absence of the statutory tenant: *Remon* v. *City of London Real Property Co.* (1)

I am accordingly of opinion that a statutory tenant has an interest or profit in land which passes to his trustee in bankruptcy, and that, if the trustee disclaims, the right or interest is lost, and the landlord can assert his right to possession and is freed from the restrictions of the Increase of Rent, &c. (Restrictions), Act, 1920. The plaintiff is therefore entitled to judgment for possession with costs.

Mr. Hansell for the plaintiffs asked me to amend the proceedings by adding a claim for mesne profits. This I am prepared to do, and will amend the writ by adding a claim for the sum of 33*l.* 9*s.* 7*d.* for mesne profits, and there will be judgment accordingly.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Farrer & Co.*
Solicitors for defendant: *Judge & Priestley.*

(1) [1921] 1 K. B. 49.

J. R.

TENDRING UNION, APPELLANTS *v.* WOOLWICH UNION, RESPONDENTS.

1922
May 17, 18.

Poor Law — Settlement — Irremovability — Residence — Hospital — Home for Crippled Girls—Poor Removal Act, 1846 (9 *&* 10 *Vict. c.* 66), *s.* 1.

St. Michael's Home, Clacton, was a home for crippled girls suffering from tubercular disease of the spine or joints (but not for those suffering from tuberculosis of lungs and therefore requiring medical treatment), and who, having been treated in hospital, had been discharged therefrom as incurable. No special medical treatment was provided, but only medical treatment for usual children's ailments. There was no limit to the time during which the girls might remain as inmates, and most of them stayed a number of years, or until some circumstance arose which necessitated their going elsewhere.

Mary Moore, then a girl aged sixteen, was admitted as an inmate of the Home in 1911, suffering from tubercular disease of the spine, having been discharged from a hospital as incurable. She remained until 1918, when the Board of Education took over the Home and limited the age of the inmates to sixteen years. She afterwards became chargeable to the respondents' Union, and upon their application, on evidence of the above facts, a Metropolitan police magistrate made an order adjudging her last settlement to be in the parish of Clacton in the appellants' Union. By consent of the parties a case was stated under 12 & 13 Vict. c. 45, s. 11, for the opinion of the Court:—

Held, that, during her stay at the Home, Mary Moore was not a "patient confined in a hospital," and had therefore acquired a legal settlement there within the Poor Removal Act, 1846, s. 1.

Ormskirk Union v. *Lancaster Union* (1912) 107 L. T. 620; 77 J. P. 45 followed.

Judgment of Lord Alverstone C.J. in *Ormskirk Union* v. *Chorlton Union* [1903] 1 K. B. 19 commented upon.

SPECIAL CASE stated by consent under 12 & 13 Vict. c. 45, s. 11.

On April 11, 1921, the respondents obtained an order from the stipendiary magistrate at Woolwich adjudging the last settlement of Mary Moore, described as a single woman, twenty-six years, and then an inmate of the infirmary, Plumstead, to be in the parish of Great Clacton in the county of Essex in the appellants' Union. Since the age of four years Mary Moore, owing to tubercular disease of the spine, had resided in various hospitals and homes.

On July 16, 1911, she was discharged from a London hospital as incurable and was thereupon received into

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St. Michael's Home for Crippled Girls, Clacton, situate in the appellants' Union. St. Michael's Home was a separate establishment, supported partly by voluntary contributions and partly by payments made in respect of individual inmates.

Para. 9 of the case stated described the Home as follows: "It was opened in 1911 as a home for crippled girls suffering from tuberculous disease of the spine or joints (but not for those suffering from tuberculosis of the lungs, which restriction implies that regular medical treatment is not provided for the inmates) and who, having been treated in hospitals, had been discharged therefrom as incurable. Under the rules of admission 'Girls crippled from other causes may be admitted if their condition is likely to be improved by treatment and sea-air,' but there is no evidence that there was any admission in accordance with this rule at any material time. During all material times it accommodated fifty-two inmates (or thereabouts) and a staff (including the Mother Superior, four assistants or sisters, and three domestics) of eight persons. The only medical treatment afforded to the girls is for the usual children's ailments and for any special appertaining to the incurable complaint (such as abscesses) of any girl. The girls are not admitted with any hope of cure. There are no facilities or provision for constant nursing or surgical or medical treatment. In any case of emergency, if the girl cannot be moved to a hospital arrangements are made similar to those which would be made at a private house. The institution has never been used except as a residence for incurable crippled girls as hereinbefore stated. Permanently bedridden persons are not admitted, but two such persons who would otherwise have been homeless have been inmates since 1911 and 1915 respectively. The following cases are admitted: Spinal disease, tuberculosis of hips or joints, and heart cases, but epileptic girls or girls with active tuberculous disease of the lungs or other contagious diseases are not admitted. None are admitted who may require skilled nursing or constant medical attendance. The only member of the staff who is a trained nurse is the Mother Superior, though another trained nurse was during

the material times generally available in a convent in the vicinity. The sisters have all acquired some nursing experience. The only medical attendant is a non-resident local doctor in private practice who visits the institution once weekly or if specially required to attend to any one in the institution. The girls as far as possible attend to themselves and help each other under the supervision of the sisters who attend to the few helpless cases there. They are educated and trained by the sisters in the hope that they may become self-supporting, in spite of their abnormal condition, by taking up some kind of employment suitable for their condition. The institution has since 1917 been in receipt of a grant from the Board of Education in respect of the girls under 16 years of age. There is no limit to the time during which a girl may remain an inmate; most of them stay a number of years and until some circumstance arises which necessitates or permits a girl going elsewhere."

During the time that Mary Moore was an inmate of the Home her brother contributed 2*s.* 6*d.* weekly towards her maintenance at the Home. She was engaged on domestic work so far as her crippled condition permitted during the whole of her residence. She required no nursing and the doctor only attended her on one or two occasions. She left the Home in September, 1918, because the Board of Education took over the institution and all girls over sixteen years of age had to leave. The appellants asserted and the respondents denied that Mary Moore was "confined as a patient in a hospital" within s. 1 of the Poor Removal Act, 1846, during her residence at the Home, so that the residence was not to be computed for settlement purposes. The question for the opinion of the Court was which of these two contentions was correct.

The arguments sufficiently appear from the judgments.

Joshua Scholefield K.C. and *Cox Sinclair* for the appellants.
Rawlinson K.C. and *Herbert Davey* for the respondents.

LORD HEWART C.J. [after referring to the facts in the case stated continued:] Our attention has been called to the

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Lord Hewart C.J.

various cases and in particular to two. The first of these is *Ormskirk Union* v. *Chorlton Union* (1), and stress was laid by the appellants upon the following passage in the judgment of Lord Alverstone C.J., which at first sight appears to be of general application: "I do not think that one can state exhaustively the reasons for this provision" (Poor Removal Act, 1846, s. 1), "but the section seems to contemplate an exemption, from the consequences of the ordinary rule, of that kind of residence which does not depend on the will of the person, and which causes him to reside in a particular place for a particular purpose." It is clear that his language there must be construed with reference to the facts of the particular case. I do not dwell upon these facts, because, as it happens, Lord Alverstone was also a party to the decision in *Ormskirk Union* v. *Lancaster Union* (2), which covers the present case. In that case Lord Alverstone said with reference to the words "patient in a hospital": "Those words were intended to include 'hospital' in what I still think was the proper definition of a hospital, that is to say, where a person has to be treated." Again he said: "As it seems to me, everything stated in the case as to a nurse being called in and medical attendance given is consistent with the ordinary medical advantages and nursing of people in an almshouse or home for children or the aged and destitute." These observations might, I think, be made a fortiori upon the facts of the present case.

In the same case Avory J. in delivering judgment said (2): "No one in ordinary language would talk of a patient in a hospital as residing at the hospital. . . . . The ordinary patient in a hospital may go there quite voluntarily; but he goes there with the intention and hope of coming out as soon as he is cured. This pauper, in my opinion, was residing at this (Nazareth) home. She was not there merely for the purpose temporarily of being cured of any ailment, but went there intending to stay, assuming the facts found are correct, that she was 16 years of age or upwards, and that she went till she should be trained and find a situation."

(1) [1903] 1 K. B. 19, 22. (2) (1912) 107 L. T. 620, 623; 77 J. P. 45.

In the present case I am of opinion not only that there was ample material upon which the tribunal might properly come to the conclusion that this institution was not a hospital, and that this poor person during the time which she spent in that institution was not a patient in a hospital ; I think further that that is manifestly the true conclusion, and in that view of the case the contention of the respondents is correct, and the order of the magistrate must be confirmed.

AVORY J. I am of the same opinion. The finding of the magistrate in this case was made on an ex parte application, but the parties to this appeal have agreed to state this case under Baines's Act, asking the Court whether as a matter of law upon the facts which are here stated, the last legal settlement of this pauper was in the parish of Great Clacton in the Tendring Union. That is how the matter comes before us. Looking at the facts as they are stated in this case I agree entirely with what my Lord has said, that it is covered by the decision of this Court in *Ormskirk Union* v. *Lancaster Union.* (1) I can see no distinction in the facts, and the only one that I would add to the recital of those which my Lord has already given, is the finding in this case that there is no limit to the time during which a girl may remain an inmate. "Most of them stay a number of years and until some circumstance arises which necessitates or permits a girl going elsewhere." That, coupled with the other facts, shows that in this case the residence of this pauper was in fact in this home. There is ample authority for saying that the residence of a pauper is the place where he has his home. I cannot doubt upon this statement of facts that this pauper had her home in this place, and, therefore, I agree that the appellants fail, and that the order of the magistrate was in the circumstances right.

GREER J. I agree. Where an appeal is brought to a Divisional Court by way of special case under Baines's Act (12 & 13 Vict. c. 45), s. 11, before any hearing of an appeal from the justices by quarter sessions, the appellant is bound by all the findings of fact by the justices, and the only

(1) 107 L. T. 620 ; 77 J. P. 45.

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question open for the consideration of this Court is whether there was any evidence upon which the justices in petty sessions (here the Metropolitan police magistrate) could find as they did. That is the result of the decision of the Court of Appeal in *Holborn Union* v. *Chertsey Union.* (1)

Looking at the present case I find (para. 1) that the magistrate "adjudged the place of the last legal settlement of one Mary Moore, in the said order described as aged 26 years, single, and then an inmate of the Infirmary, Plumstead, to be in the parish of Great Clacton, in the County of Essex, and in the Tendring Union." The only question which is open to the Court is whether or not upon the facts stated in this case there was any evidence upon which the learned magistrate could in law have decided as he did. When that is stated as the question and when paragraph 9 of the case is read, I think it is clear to demonstration that there was evidence upon which the magistrate could so hold. If the appellants had not been content with his conclusion of fact their remedy was to go on with their appeal at quarter sessions. If they were content with his findings of fact then all they could do was by way of special case to contend that upon the facts the magistrate ought, as a matter of law, to have come to an opposite conclusion.

I have only one other observation to make: In order to succeed the appellants would have to show that the facts afforded conclusive evidence that this girl was residing or confined in a hospital as a patient. The word "patient" seems to me to involve that the primary purpose of the inmate in the alleged hospital should be either medical or surgical treatment. The facts show the contrary, and if it were a question of fact which was open to us I should have found in exactly the same way as the magistrate found in the first instance.

Appeal dismissed.

Solicitors for appellants: *Morris & Bristow, for Ward & Ward, Harwich.*

Solicitor for respondents: *E. W. Sampson.*

(1) (1885) 15 Q. B. D. 76.

F. P. F.

PENNINGTON *v.* RELIANCE MOTOR WORKS, LIMITED.

1922
May 22, 24.

[1921. P. 3500.]

Lien—Contract to rebuild Motor-car—Sub-contract—Lien of Sub-contractor against Owner of Car—Authority to create Lien—Loss of Lien by re-delivery of Possession.

The plaintiff agreed with one E. that the latter should rebuild his motor-car. E., without plaintiff's knowledge, sub-contracted the work to the defendants. The defendants, believing that E. would in due course be paid by the plaintiff and would then pay them, redelivered the car to E. The plaintiff paid E., who did not pay the defendants. Subsequently, in ignorance of the above facts, the plaintiff sent the car to the defendants for repairs, and the latter claimed a lien thereon for the work done for E.:—

Held, that they had no lien, as the plaintiff gave no authority, express or implied, to E. to create one, and no trade custom was proved, and, secondly, that even if there had been a lien the defendants lost it when they parted with the possession of the car to E.

ACTION tried by McCardie J.

The following statement of facts is substantially taken from the judgment.

In August, 1921, the plaintiff, Captain Pennington, arranged with one Eley to put a fresh body on the chassis of his motor-car for 500*l.* Eley immediately bargained with the defendants, a firm of body builders, to do the work for 377*l.*, and he delivered the car to them for the purpose. This was done without the plaintiff's authority. On October 7 Eley, having received back the car from the defendants, delivered it to the plaintiff and was paid the 500*l.* He, however, did not pay the defendants. Some time afterwards the plaintiff delivered the car to the defendants to remedy certain defects, and to his surprise, on November 21, received a letter from their solicitors saying that the defendants would hold the car, not only in respect of the charges for the present work, but also in respect of the building of the body on E.'s order.

The plaintiff claimed the return of the car, or 2000*l.*, its value, and damages for its detention.

Neilson K.C. and *J. B. Melville* for the plaintiff.

Disturnal K.C. and *Storry Deans* for the defendants. The

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defendants had a lien on the car although their contract was with Eley and not with the plaintiff. In the circumstances Eley had the plaintiff's authority to leave the car with the defendants. Nothing in the agreement prevented it or implied that the work was to be done by Eley himself. In these circumstances Eley had authority to create a lien in the defendants' favour: *Keene* v. *Thomas*. (1) The authority need not be express.

[*Singer Manufacturing Co.* v. *London and South Western Ry. Co.* (2) was also referred to.]

Neilson K.C. in reply. The plaintiff never gave Eley authority, express or implied, to part with the car to the defendants, or to create a lien, and consequently Eley was unable to create a lien in their favour as against the plaintiff.

[*Buxton* v. *Baughan* (3) and *Cassils & Co.* v. *Holden Wood Bleaching Co.* (4) were referred to.]

Even if the defendants had a lien they lost it by parting with the possession of the car to Eley.

McCARDIE J. having stated the facts, continued: Two points call for consideration. First, could Eley create as against the plaintiff a lien on the car, or only as against himself? The plaintiff gave no express authority to Eley to deliver the car to any third person nor, in my opinion, can it be said that he gave an implied authority. In *Hiscox* v. *Greenwood* (5) it was pointed out by the Court that a lien of this sort must be derived from legitimate authority. In *Buxton* v. *Baughan* Alderson B. said (6): "If you trust your goods into a man's possession, and he makes a bargain about them without your authority, you are not bound by that bargain, and may reclaim the goods." That must be the basic principle of these cases, and it must be appreciated before the principle of *Keene* v. *Thomas* (1) can be understood. That case can only rest on the basis of implied authority, and was followed by the Court of Appeal in *Green* v. *All Motors*,

(1) [1905] 1 K. B. 136.
(2) [1894] 1 Q. B. 833.
(3) (1834) 6 C. & P. 674.
(4) (1914) 112 L. T. 373.
(5) (1803) 4 Esp. 174.
(6) 6 C. & P. 674, 675.

Ld. (1), where the facts were similar. Then comes *Singer Manufacturing Co.* v. *London and South Western Ry. Co.* (2), which I mention last because it is, to my mind, an exceptional case, on the border line. I venture to think that implied authority is the true ratio of that case, and that it represents the extreme limit to which the principle can be carried.

The three last-mentioned cases are exceptions to the general rule that, prima facie, a lien cannot be created against a man except by his express authority, and I doubt whether *Cassils & Co.* v. *Holden Wood Bleaching Co.* (3) has yet received the full appreciation to which it is entitled. It was held in that case that there was no implied authority on the part of the persons who received goods from the plaintiff to bleach them, to create a lien in favour of the defendants to whom those persons had given the sub-contract to do the work, which the defendants could enforce against the plaintiff. In my opinion no right of lien is created in favour of a sub-contractor as against the owner of goods, unless the sub-contractor can show either express or implied authority, or a custom of the trade. In the present case I am clearly of opinion that Captain Pennington gave no express or implied authority to Eley to create a lien in favour of the defendants and no proof of any custom of trade was given. Therefore the defence fails on that ground.

Even if the defendants had at one time an enforceable lien against the plaintiff they lost it by voluntarily giving up possession to Eley free from the lien: *Hatton* v. *Car Maintenance Co.* (4) and *Jowitt & Sons* v. *Union Cold Storage Co.* (5) I recognize to the full the principle laid down in *North Western Bank* v. *Poynter* (6), which established an important principle in connection with redelivery by bailee to bailor. According to the headnote: "In the law of Scotland, as in the law of England, a pledgee may redeliver the goods to the pledgor for a limited purpose without thereby losing his rights under the contract of pledge." But here I think that the

(1) [1917] 1 K. B. 625.
(2) [1894] 1 Q. B. 833.
(3) 112 L. T. 373.
(4) [1915] 1 Ch. 621.
(5) [1913] 3 K. B. 1.
(6) [1895] A. C. 56.

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McCardie J.

defendants allowed Eley to take possession of the car not for any limited purpose, but in the belief that he would get payment from Captain Pennington, and would pay them as soon as he could.

I hold, therefore, first, that the defendants never had a lien, and secondly, that if it ever existed it was lost by their renunciation of possession. There will therefore be judgment for the plaintiff for the return of the car with 25*l.* damages for its detention.

Judgment for plaintiff.

Solicitor for plaintiff: *C. H. Nash.*

Solicitors for defendants: *Lempriere & Hunter.*

W. L. L. B.

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July 13.

EVERETT *v.* GRIFFITHS (No. 2) AND ANOTHER.

Election Law—Board of Guardians—Alleged Disqualification—Petition—Liability of Petitioner to give Security for Costs—Petitioner admitted to proceed as a Poor Person—Municipal Corporations Act, 1882 (45 *&* 46 *Vict. c.* 50), *s.* 89, *sub-ss.* 1, 2—*Local Government Act,* 1894 (56 *&* 57 *Vict. c.* 73), *s.* 20, *sub-s.* 5—*Guardians (London) Election Order,* 1898, *cl.* 24 (2.) (*c*)—*Rules of Supreme Court, Order* XVI., *rr.* 22–31.

An unsuccessful candidate at an election of guardians of the poor for a parish having been admitted to take proceedings as a poor person under Order XVI., rr. 22–31, presented a petition under the Municipal Corporations Act, 1882, and the Local Government Act, 1894, to have it determined that two of the successful candidates had not been duly elected and that the petitioner and another unsuccessful candidate had been duly elected in their stead. The petitioner did not give security for costs pursuant to s. 89 of the Act of 1882 as amended by the later Act. On an application by one of the successful candidates in that behalf:—

Held, that, the petitioner not having given security, the petition should be struck off the file, on the ground (1.) that s. 89 of the Act of 1882 in providing that the petitioner should give security for costs was imperative and absolute and applied equally whether a petitioner had or had not been admitted to take proceedings as a poor person under the Rules; or (2.) that the proceedings which the petitioner was seeking to take in so far as they took place before the election court would not be "proceedings in the High Court of Justice" within the meaning of r. 22 from the costs of which alone a poor person was exempted by r. 31E.

Held, also, that the costs for which a petitioner was required to give security by s. 89 included costs from which a poor person was not exempt under r. 31E.

APPEAL from an order of Shearman J.

On April 5, 1922, an election took place under the Municipal Corporations Act, 1882, and the Local Government Act, 1894, for the Board of Guardians of the poor for the parish of St. Mary, Islington, in the county of London, Lower Holloway Ward. There were eight candidates, including the appellant Harry Gordon Everett, one E. J. Callow, one Samuel Cary and the respondents H. J. Griffiths and E. W. Mokler, and the three last-named candidates were declared duly elected.

The appellant obtained an order under the Rules of the Supreme Court, Order XVI., rr. 22–31, admitting him to take legal proceedings thereunder as a poor person.

On April 26, 1922, the appellant presented an election petition under the above Acts alleging (para. 3) that the respondents Griffiths and Mokler were disqualified from holding office as guardians on the ground that they were connected with businesses which held contracts with the said Board and were therefore disqualified by virtue of s. 46, sub-s. 1 (*e*), of the Act of 1894; and praying (para. 4) that it might be determined that the respondents were not duly elected, and that the appellant and Callow were duly elected as members of the said Board in their stead.

The respondents thereupon made an application to the judge in chambers to strike the petition off the file on the ground that the appellant had not lodged security for costs pursuant to s. 89 of the Act of 1882, or alternatively to order the appellant to forthwith lodge security pursuant to that section, and that until the security was lodged all further proceedings should be stayed.

The application was opposed by the appellant, on whose behalf an affidavit was made alleging that he had been duly admitted as a poor person to take the proceedings and that the respondents had been duly notified of the fact on May 6, 1922, and submitting that as the appellant was a poor person

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the provisions of the Act of 1882 providing for the lodging of security did not apply to him.

The *Appellant* in person. The appellant was not bound at the time of presenting the petition or at all to lodge security for costs under s. 89 of the Municipal Corporations Act, 1882.

The appellant duly obtained, under Order XVI., rr. 22–31, an order admitting him to take proceedings as a poor person. By r. 22 the proceedings which a person obtaining an order under these rules is admitted to take are "any legal proceedings in the High Court of Justice"; and by r. 31E he shall not be liable, unless otherwise ordered, to pay costs to any other party. An election petition under the Municipal Corporations Act, 1882, is a proceeding in the High Court of Justice within the meaning of r. 22. Sect. 88, sub-s. 3, of the Act expressly provides that the petition shall be presented to the High Court in the Queen's Bench Division. The costs for which the petitioner is required to give security by s. 89, sub-s. 1, of the Act of 1882—namely, "all costs, charges and expenses which may become payable by him to any witness summoned on his behalf, or to any respondent," are costs for which by r. 31E, unless otherwise ordered, a poor person shall not be liable. A person who has been admitted to proceed in forma pauperis cannot be required to give security for the costs of an appeal to the Court of Appeal: *Willé* v. *St. John* (1), and on the same principle he cannot be required to give security under the Act of 1882. As to the amount of the security, the Act of 1882, s. 89, sub-s. 2, provided that it should be to such amount not exceeding 500*l.* as the High Court directed; but in the case of an election of guardians it was provided by the Local Government Act, 1894, that the election should be conducted according to rules framed under that Act; and as to elections of guardians it was thereupon provided by the Guardians (London) Election Order, 1898, cl. 24 (2.) (*c*), that s. 89, sub-s. 2, of the Act of 1882 should be altered so as

(1) [1910] 1 Ch. 701.

to read that the security should be 50*l.*, unless the Court or a judge order a lesser amount or a larger amount not exceeding 300*l.*

Pritt, for the respondents. The appellant is bound to give security for the costs of and consequent upon the petition.

The Act of 1882, s. 89, sub-s. 1, provides that the petitioner "shall give security for all costs, charges, and expenses which may become payable by him to any witness summoned on his behalf, or to any respondent." The sub-section in imperative terms makes it a condition of presenting the petition that the petitioner shall give the required security. There is no fund except the security fund for payment of the costs in the event of the parties being unable to pay them. A person who has obtained an order under Order XIV., rr. 22-31, admitting him to take legal proceedings in the High Court of Justice as a poor person is not thereby exempted from giving the security for costs required of a petitioner under the Act of 1882. Under s. 89, sub-s. 2, as amended pursuant to the Act of 1894 by the Order in Council of 1898, the amount of the security shall be 50*l.* unless otherwise ordered, and here no order has been made that the security should be to a lesser amount. The respondents, however, are content that the amount shall be assessed by the judge in chambers. Further, the costs of these proceedings are not costs from which a person who has obtained an order admitting him to proceed as a poor person under Order XVI., rr. 22-31, is exempt from liability. By r. 22 the only proceedings which a person who has obtained an order of that kind is admitted to take as a poor person are proceedings in the High Court of Justice. The order does not entitle him to take proceedings in a court other than the High Court, as for example in a county court: *Cook* v. *Imperial Tobacco Co.* (1) By r. 31E the only costs for which the poor person is not liable are the costs of proceedings in the High Court of Justice. The costs for which a person presenting an election petition of this kind is required to give security under the Act of 1889, s. 89, are not costs of proceedings in the High Court of Justice, but costs of the

(1) [1922] 2 K. B. 158.

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trial at an election court which is a court specially constituted under s. 92, or of preliminary proceedings on the petition before a judge in chambers.

The *Appellant*, in reply: In making provision for the giving of security by the petitioner, s. 89 of the Act of 1882 is not absolute or mandatory, inasmuch as it gives the Court or a judge full discretion as to the amount of the security. It appears from s. 93, sub-s. 7, that it is the intention of the Legislature that the proceedings on the petition should throughout be deemed to be proceedings in the High Court of Justice. There is nothing in the Acts to show that the election court is not a branch of the High Court of Justice. It is a fundamental principle of the constitution that no one should be denied justice on the ground of his poverty. The present rules relating to poor persons are merely the re-enactment of a law which has existed from time immemorial.

LUSH J. This appeal raises a question of importance which is not free from difficulty. The appellant, who has appeared in person, has done full justice to his case. [His Lordship stated the facts and continued :] The Municipal Corporations Act, 1889, s. 89, sub-s. 1, provides : "At the time of presenting an election petition or within three days afterwards, the petitioner shall give security for all costs, charges, and expenses which may become payable by him to any witness summoned on his behalf, or to any respondent." That provision is still in force. As to the amount of the security, sub-s. 2 provided that the security should be to such amount not exceeding 500*l.* as the Court or a judge directed. That amount has, however, as regards elections of guardians, been altered, pursuant to the Local Government Act, 1894, s. 20, sub-s. 5, by the Guardians (London) Election Order, 1898, cl. 24, sub-cl. 2 (*c*), which provides that the security shall be 50*l.* unless in any case the Court or a judge orders that it shall be to a lesser amount or to a larger amount not exceeding 300*l.*

In the present case the appellant obtained an order admitting him to present the petition and take the proceedings thereon

as a poor person. The order was made under the Rules of the Supreme Court, Order XVI., r. 22, which provides: "Any person may be admitted to take or defend or be a party to any legal proceedings in the High Court of Justice as a poor person on satisfying the Court or a judge that he has reasonable grounds for taking or defending or being a party to such proceedings." It must therefore be taken that prima facie for the purpose of these proceedings he is a poor person and has a right to proceed as such. Order XVI., r. 31E, provides that when a person is admitted to be a party to any legal proceedings "he shall not be liable for any court fees nor, unless the Court or a judge shall otherwise order, to pay costs to any other party."

The first question that arises is whether or not these proceedings on petition under the Act of 1882 are "proceedings in the High Court of Justice" within the meaning of Order XVI., r. 22. It is said on behalf of the respondent that these proceedings are not proceedings in the High Court of Justice within the meaning of that rule, but are proceedings before a special court called the election court constituted under s. 92 of the Act of 1882. If that argument is sound then the order admitting the appellant to take the proceedings as a poor person does not exempt him from the obligation to give the security required by the Act of 1882. It seems to me that that argument is partly sound and partly unsound. It is fairly clear that all the preliminary proceedings take place in the High Court of Justice. Sect. 88, sub-s. 3, of the Act of 1888 provides that the petition shall be presented to that Court, and s. 93, sub-s. 7, which gives power to direct that the matter of the petition be stated in the form of a special case, expressly directs that the special case shall be heard before that Court, whose decision shall be final. As these preliminary proceedings take place in the High Court of Justice, it is difficult to accept the view that the costs incidental thereto are not costs in respect of which he is exempt from liability under Order XVI., r. 31E. On the other hand, I cannot accede to the view that the trial of the petition by the election court is a proceeding "in the High Court of Justice" within the

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meaning of Order XVI., r. 22. The election court is a specially constituted court, and I do not think that proceedings in that court are within the scope of that rule.

Another and a more difficult question is, what is the effect of the order admitting the appellant to take proceedings as a poor person in regard to s. 89 of the Act of 1882, which I have already read. That section is imperative in its terms, and it does not exempt from the obligation of the petitioner to give security for costs a person who has not the means to enable him to prosecute the petition. I have come to the conclusion that that provision is applicable to the present case, notwithstanding that the proceedings are to some extent proceedings in the High Court of Justice. I do not think that it was intended that the rules of Order XVI. relating to proceedings by poor persons should interfere with the special proceedings on election petitions under the Act of 1882. The proceedings under the Act are of a different character from those dealt with by these rules.

Further, in my opinion, costs, such as those here in question, for which a petitioner is required to give security by s. 89 of the Act of 1882, include costs in respect of which a poor person is not relieved from liability by Order XVI., r. 31E. For example, the costs of any witness summoned on the petitioner's behalf are not such costs as a poor person is exempted from paying under that rule. I cannot, therefore, see that the rule exempts him from liability to pay the costs referred to in s. 89. The petitioner says that being a poor person he is entitled to summon witnesses on his behalf free of cost. Section 89, however, provides that the petitioner shall give security for these costs and that a fund shall thus be provided for paying them. There is nothing in the rule which exempts the petitioner from liability for the costs of the proceedings or from giving security for them. There is, no doubt, power to reduce the amount of the security in a proper case. In this case, however, the only question which the Court has to decide is whether the fact that the petitioner has obtained a poor person's order exempts him from the obligation imposed by s. 89. In my opinion it does not.

Unless a statute in express terms repeals an earlier statute, or uses language which is clearly inconsistent with its remaining in force, then the earlier statute is not repealed. I do not find anything in the rules relating to poor persons or elsewhere which shows that it was intended that s. 89 of the Act of 1882 should be repealed. That section applies to every person presenting an election petition under the Act, and among others to a poor person.

In my opinion the order of Shearman J. was right, and this appeal should be dismissed.

BAILHACHE J. I am of the same opinion. So far as I am aware, before the passing of the Municipal Corporations Act, 1882, no case had decided, and apparently no one had even suggested, that a person admitted to sue in the High Court of Justice in forma pauperis would, on presenting an election petition, have been exempted from the statutory liability to give security for costs. It has not been shown that since the passing of the Act a person in that position is more advantageously situated, and there is good ground for holding that he is not. For the reasons so fully stated by my Lord, I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Rowe & Maw.*

Solicitors for respondents: *Samuel Price, Sons & Robertson.*

J. R.

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Oct. 19.

[IN THE COURT OF APPEAL.]

EVERETT *v.* GRIFFITHS (No. 3) and Another.

Local Government—Guardian—Election Petition—Interlocutory Order—Appeal—Question of Law—Leave of High Court—Jurisdiction of Court of Appeal—Judicature Act, 1881 (44 *&* 45 *Vict. c.* 68), *s.* 14—*Municipal Corporations Act,* 1882 (45 *&* 46 *Vict. c.* 50), *s.* 89, *sub-s.* 1; *s.* 242, *sub-s.* 3—*Local Government Act,* 1894 (56 *&* 57 *Vict. c.* 73), *s.* 48, *sub-s.* 3.

By s. 14 of the Judicature Act, 1881, "The jurisdiction of the High Court of Justice to decide questions of law, upon appeal or otherwise, under . . . . the Corrupt Practices (Municipal Elections) Act, 1872, ... or any Act amending the same . . . . shall henceforth be final and conclusive, unless in any case it shall seem fit to the said High Court to give special leave to appeal therefrom to Her Majesty's Court of Appeal." . . . .

By s. 242, sub-s. 3, of the Municipal Corporations Act, 1882, "Where any Act passed before this Act, ... refers to the Municipal Corporations Act, 1835, or any Act amending it, ... the reference shall be deemed to be to this Act or to the corresponding provision of this Act" . . . .

In an election petition against the election of a guardian of a certain parish the petitioner having obtained leave to proceed with the petition as a poor person claimed to be thereby relieved from the obligation to give or find the security for costs prescribed by s. 89 of the Municipal Corporations Act, 1882, as amended and applied to guardians' elections by s. 48, sub-s. 3, of the Local Government Act, 1894, and r. 24 of the Guardians (London) Election Order, 1898, made thereunder. The election judge made an order that the petition should be struck off the file, the petitioner not having given or found the prescribed security. A Divisional Court of the King's Bench Division affirmed this order and refused the petitioner leave to appeal to the Court of Appeal. The petitioner having appealed to the Court of Appeal by leave of that Court:—

Held, by Bankes and Scrutton L.JJ. and Eve J., that no appeal lay without the leave of the High Court, for that the Municipal Corporations Act, 1882, is an Act deemed to be referred to in s. 14 of the Judicature Act, 1881;

Line v. *Warren* (1885) 14 Q. B. D. 548 and *Beresford-Hope* v. *Lady Sandhurst* (1889) 23 Q. B. D. 79 followed;

and the question whether the petitioner was excused from giving or finding security was a question of law arising—

Per Bankes L.J., under the Act of 1882 as applied to guardians' elections by the Local Government Act, 1894;

Per Scrutton L.J., under the Act of 1882 together with the Act of 1894;

Per Eve J., under the Act of 1894 alone or together with the Act of 1882, it being

Held by Scrutton L.J. and Eve J. that the Act of 1894, as amending the Act of 1882, is also to be deemed to be referred to in s. 14 of the Act of 1881.

Per Curiam. The leave of the High Court was none the less necessary because the order of that Court was an interlocutory and not a final order.

Shaw v. *Reckitt* [1893] 2 Q. B. 59 followed; *Lord Monkswell* v. *Thompson* [1898] 1 Q. B. 353 questioned.

APPEAL from an order of a Divisional Court.

H. G. Everett was a candidate at an election of Guardians of the Poor of the parish of St. Mary, Islington, for the Lower Holloway Ward. The election was held on April 5, 1922. The candidates elected were Samuel Cary and the respondents H. J. Griffiths and E. W. Mokler. On April 21 H. G. Everett presented a petition against the respondents on the ground that they were disqualified for being elected or being members of a board of guardians by s. 46, sub-s. 1 (*e*), of the Local Government Act, 1894, praying that he himself and one E. J. Callow, being the two candidates receiving the highest and next highest number of votes after those elected, might be declared elected. He then applied for and obtained leave to be admitted as a poor person to prosecute the petition.

By s. 89 of the Municipal Corporations Act, 1882, as applied and amended by s. 48, sub-s. 3, of the Local Government Act, 1894, and r. 24 of the Guardians (London) Election Order, 1898 (1), the petitioner must give security for all costs, charges,

(1) Municipal Corporations Act, 1882, s. 89, sub-s. 1: "At the time of presenting an election petition or within three days afterwards, the petitioner shall give security for all costs, charges, and expenses which may become payable by him to any witness summoned on his behalf, or to any respondent."

Sub-s. 2: "The security shall be to such amount, not exceeding five hundred pounds, as the High Court, or a judge thereof, on summons, directs, and shall be given in the prescribed manner, either by a deposit of money, or by recognisance entered into by not more than four sureties, or partly in one way and partly in the other."

Sub-s. 3: "Within five days after the presentation of the petition the petitioner shall in the prescribed manner serve on the respondent a notice of the presentation of the petition, and of the nature of the proposed security, and a copy of the petition."

Sub-ss. 4, 5, and 6 relate to objections by the respondent to the security offered and the removal of such objections if allowed.

Sub-s. 7: "If no security is given, as prescribed, or any objection is allowed and is not removed, as aforesaid, no further proceedings shall be had on the petition."

Local Government Act, 1894, s. 20: "As from the appointed day the following provisions shall apply to boards of guardians" . . . .

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and expenses which may become payable by him to any witness summoned on his behalf, or to any respondent. The amount of the security and the manner in which it is to be given are prescribed, and if no security is given as prescribed no further proceedings shall be had on the petition.

The petitioner not having given the required security, the respondent Griffiths applied to Shearman J. to strike the petition off the file or to stay further proceeding thereon until security should be given. The petitioner contended that

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Sub-s. 5: "The election shall . . . . be conducted according to rules framed under this Act by the Local Government Board."

Sect. 48, sub-s. 3: "At every election regulated by rules framed under this Act, the poll shall be taken by ballot, and the Ballot Act, 1872, and the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, and ss. 74 and 75 and Part IV." [ss. 77 to 104 inclusive] "of the Municipal Corporations Act, 1882, as amended by the last-mentioned Act . . . . shall, subject to adaptations, alterations, and exceptions made by such rules, apply in like manner as in the case of a municipal election."

The Guardians (London) Election Order, 1898, contains r. 24 headed Adaptation of Municipal Corporations Act, 1882. By sub-s. 2 of that rule it is provided: "In the application of Part IV. of the Municipal Corporations Act, 1882 (relating to corrupt practices and election petitions), as amended by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, the following adaptations and alterations shall have effect:—(*a*) Such application shall be subject to the provisions of this order. (*b*) References to the election of guardians shall be substituted for references to a municipal election or to an election to a corporate office . . . . (*c*) In the application of s. 89, sub-s. 2, such sub-section shall be adapted and altered so as to read as follows:—'(2) The security shall be to the amount of 50*l.*, unless in any case the High Court or a judge thereof, on summons, order that the same shall be to a lesser amount, or to a larger amount not exceeding 300*l.*, and shall be given in the prescribed manner either by a deposit of money or by recognizance entered into by not more than four sureties, or partly in one way and partly in the other.'"

Judicature Act, 1881, s. 14: "The jurisdiction of the High Court of Justice to decide questions of law, upon appeal or otherwise, under . . . . the Corrupt Practices (Municipal Elections) Act, 1872, ... or any Act amending the same . . . . shall henceforth be final and conclusive, unless in any case it shall seem fit to the said High Court to give special leave to appeal therefrom to Her Majesty's Court of Appeal, whose decision in such case shall be final and conclusive."

By the Municipal Corporations Act, 1882, s. 242, sub-s. 3: "Where any Act passed before this Act, and not specified in the First or in the Ninth Schedule, refers to the Municipal Corporations Act, 1835, or any Act amending it . . . . the reference shall be deemed to be to this Act or to the corresponding provision of this Act . . . . (as the case may require)."

having obtained leave to proceed as a poor person he was relieved from the burden of giving or finding security. On May 12 the learned judge ordered that the petition as against the respondent Griffiths should be struck off the file and gave the petitioner leave to appeal. On appeal the Divisional Court (Lush and Bailhache JJ.) affirmed the order of Shearman J. and refused leave to appeal. (1) The petitioner then applied to the Court of Appeal for leave and obtained leave to appeal from the decision of the Divisional Court.

The appeal being called on,

Pritt for the respondent Griffiths took a preliminary objection to the hearing of the appeal. By s. 14 of the Judicature Act, 1881, the Court of Appeal has no jurisdiction unless the High Court of Justice gives leave to appeal, which that Court has refused to do. Sect. 14 provides that "The jurisdiction of the High Court of Justice to decide questions of law, upon appeal or otherwise, under . . . . the Corrupt Practices (Municipal Elections) Act, 1872, ... or any Act amending the same respectively, shall henceforth be final and conclusive, unless in any case it shall seem fit to the said High Court to give special leave to appeal therefrom to Her Majesty's Court of Appeal, whose decision in such case shall be final and conclusive." That section applies to petitions regulated by the Municipal Corporations Act, 1882, for the following reasons: Sect. 242, sub-s. 3, of the Act of 1882 enacts that where any Act passed before the Act of 1882 and not specified in certain schedules, refers to the Municipal Corporations Act, 1835, or any Act amending it . . . . the reference shall be deemed to be to the Act of 1882 or to the corresponding provision of that Act. The Judicature Act, 1881, in s. 14 refers to the Corrupt Practices (Municipal Elections) Act, 1872, which by s. 29 repeals ss. 54 to 56 of the Municipal Corporations Act, 1835, and is therefore an Act amending the Act of 1835. Therefore s. 14 of the Judicature Act, 1881, is to be deemed to refer to and to be incorporated with the Municipal Corporations Act, 1882: *Line* v. *Warren* (2);

(1) Ante, p. 130. (2) 14 Q. B. D. 548.

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Beresford-Hope v. *Lady Sandhurst.* (1) Sect. 100, sub-s. 4, of the Act of 1882 gives the High Court the same powers and jurisdiction with respect to a municipal election petition as if the petition were an ordinary action within its jurisdiction, and therefore confers upon that Court jurisdiction to make interlocutory orders. From such orders there is no appeal to the Court of Appeal without the leave of the High Court: *Shaw* v. *Reckitt* (2); if the question raised is a question of law. The question sought to be raised by the present appeal is whether a petitioner who has got leave to proceed as a poor person is excused from finding the security prescribed by s. 89, sub-s. 1, of the Municipal Corporations Act, 1882. That is a question of law: *Shaw* v. *Reckitt.* (2)

The *Appellant* in person. Sect. 14 of the Judicature Act, 1881, only applies to questions of law raised by a special case stated under s. 15 of the Corrupt Practices (Municipal Elections) Act, 1872, or s. 93 of the Municipal Corporations Act, 1882, and not to interlocutory matters: *Harmon* v. *Park* (3); *Lord Monkswell* v. *Thompson.* (4) The question on this appeal arises not under the Municipal Corporations Act, 1882, but under the Local Government Act, 1894, and is not affected by s. 14 of the Judicature Act, 1881.

Pritt in reply. By s. 20, sub-s. 5, of the Local Government Act, 1894, the election of guardians is to be conducted according to rules framed under that Act by the Local Government Board. By s. 48, sub-s. 3, at every election regulated by rules framed under the Act the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, and ss. 74 and 75 and Part IV., containing ss. 77 to 104 inclusive, of the Municipal Corporations Act, 1882, as amended by the last-mentioned Act shall, subject to adaptations, alterations, and exceptions made by the rules, apply in like manner as in the case of a municipal election. It is plain therefore that s. 14 of the Judicature Act, 1881, which is deemed to refer to and to be incorporated with the Municipal Corporations Act, 1882, must be deemed to

(1) 23 Q. B. D. 79.
(2) [1893] 2 Q. B. 59.
(3) (1880) 6 Q. B. D. 323.
(4) [1898] 1 Q. B. 353.

refer to and be incorporated with the Local Government Act, 1894, also.

Harmon v. *Park* (1) was decided before the Judicature Act, 1881, was passed. *Lord Monkswell* v. *Thompson* (2) simply followed *Harmon* v. *Park* (1) without reference to that Act. *Harmon* v. *Park* (1) was afterwards disapproved in *Shaw* v. *Reckitt* (3), and *Lord Monkswell* v. *Thompson* (2) must share in the disapproval.

BANKES L.J. The argument on the preliminary point raises an important question, whether Mr. Pritt for the respondent has brought the case within s. 14 of the Judicature Act, 1881. That depends upon two other questions: First, whether the Municipal Corporations Act, 1882, is one of the statutes referred to in s. 14 of the Judicature Act, 1881, as amending the Corrupt Practices (Municipal Elections) Act, 1872; and secondly, whether the matter in dispute arises under the Municipal Corporations Act, 1882, or an Act amending it.

Sect. 242, sub-s. 3, of the Municipal Corporations Act, 1882, is in these terms: "Where any Act passed before this Act, and not specified in the First or in the Ninth Schedule, refers to the Municipal Corporations Act, 1835, or any Act amending it . . . . the reference shall be deemed to be to this Act or to the corresponding provision of this Act. . . . ." The Judicature Act, 1881, was passed before that Act; it is not specified in the First or Ninth Schedule to that Act. Then does it refer to the Municipal Corporations Act, 1835, or any Act amending it? It refers to the Corrupt Practices (Municipal Elections) Act, 1872, and that Act, Mr. Pritt contends, is an Act amending the Municipal Corporations Act, 1835. In support of this contention he cites two decisions of this Court: *Line* v. *Warren* (4) and *Beresford-Hope* v. *Lady Sandhurst.* (5) I think he is right in his contention. In the argument in *Line* v. *Warren* (4) this very point was elaborated and it was accepted by the Court; and

(1) (1880) 6 Q. B. D. 323.
(2) [1898] 1 Q. B. 353.
(3) [1893] 2 Q. B. 59.
(4) 14 Q. B. D. 548.
(5) 23 Q. B. D. 79.

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Beresford-Hope v. *Lady Sandhurst* (1) followed and approved *Line* v. *Warren.* (2) Those two decisions bind this Court to hold that the Municipal Corporations Act, 1882, or the appropriate group of sections, including s. 89, is incorporated with s. 14 of the Judicature Act, 1881.

Then is the question in the present case a question of law arising under the Municipal Corporations Act, 1882? The question is whether a petitioner who has got leave to proceed as a poor person is by that fact excused from the obligation to find security. If the distinction is between questions of law and questions of fact, this is plainly a question of law. That is the ordinary intention and meaning of the phrase "question of law," and Lord Esher M.R. in *Shaw* v. *Reckitt* (3) indicated that the phrase is here used in its ordinary sense. Then does it arise under the Municipal Corporations Act, 1882? The appellant argues that the Act of 1882 did not apply to elections of guardians; the Act which deals with those is the Local Government Act, 1894. That is true, but the means used is that by s. 20, sub-s. 5, of that Act power is given to the Local Government Board to frame rules for the conduct of these elections, and by s. 48, sub-s. 3, at every such election Part IV. of the Municipal Corporations Act, 1882, as amended by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, shall, subject to adaptations, alterations, and exceptions made by the rules, apply as in the case of a municipal election. In pursuance of the power thus conferred on the Local Government Board the Guardians (London) Election Order, 1898, was made. Rule 24 (*c*) of that order deals with this matter of security upon an election petition. It provides that s. 89, sub-s. 2, of the Municipal Corporations Act, 1882, in its application to the election of guardians shall be adapted and altered so as to read as follows: "2. The security shall be to the amount of 50*l.* unless in any case the High Court or a judge thereof, on summons, order that the same shall be to a lesser amount, or to a larger amount not exceeding 300*l.* . . . . " In these circumstances

(1) 23 Q. B. D. 79. (2) 14 Q. B. D. 548.
(3) [1893] 2 Q. B. 59.

s. 89 of the Act of 1882 applies with its alterations to an election of guardians, and the question whether sub-s. 7 is rendered inoperative where a petitioner obtains leave to proceed as a poor person is a question arising under the Act of 1882. It follows that the provisions of s. 14 of the Judicature Act, 1881, apply to this case, and that in the circumstances no appeal lies to this Court.

The appellant relied on *Lord Monkswell* v. *Thompson* (1) as an authority that from interlocutory orders made in proceedings on an election petition an appeal lies to this Court without leave. It is not easy to see the ground of that decision. Sect. 14 of the Judicature Act, 1881, was not cited. The inference seems to be that the case was treated as raising a question of fact. It was decided on the authority of *Harmon* v. *Park* (2); but that case, as is pointed out by A. L. Smith L.J. in *Shaw* v. *Reckitt* (3), was before the Act of 1881, which makes the decision of the Divisional Court final upon questions of law, no matter how raised, unless special leave be given to appeal. Therefore *Lord Monkswell* v. *Thompson* (1) cannot be regarded as an authority upon the point before us.

The only remaining point is that this Court gave the appellant leave to appeal and should not now stultify itself by holding that it has no jurisdiction to hear the appeal. But interlocutory leave is often given to enable the parties to argue the point whether the Court has jurisdiction. The leave implies no more than that the Court considers the question of its jurisdiction a point that ought to be argued. If upon argument it appears that it has no jurisdiction, the only course open to the Court is to refuse to hear the appeal. The preliminary point succeeds and the appeal must be dismissed.

SCRUTTON L.J. I am of the same opinion. The point which the appeal, if allowed, was intended to raise, is a substantial one. Sect. 89 of the Municipal Corporations Act, 1882, as applied to the election of guardians by the

(1) [1898] 1 Q. B. 353. (2) 6 Q. B. D. 323.
(3) [1893] 2 Q. B. 59.

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Local Government Act, 1894, and the rules made under that Act by the Local Government Board, provides that on an election petition the petitioner must give security as prescribed or he cannot proceed with his petition; and the question is whether that enactment is subject to an implied exception where he has obtained leave to proceed as a poor person. That question, it is said, this Court cannot now decide, because on the appellant rising to argue it, a preliminary objection was taken that the appeal falls within the scope of s. 14 of the Judicature Act, 1881, and that consequently the decision of the Divisional Court is final unless that Court gives leave to appeal, which in fact it has refused. Therefore the point we have to decide is, not the substantial point, but a preliminary one, namely whether an appeal lies to this Court from the decision of the Divisional Court.

In order that an appeal may fall within s. 14 of the Judicature Act, 1881, it must be an appeal, first on a question of law, and secondly on a question arising under one of certain specified Acts or any Act amending the same. The question is whether a statutory enactment is subject to an implied exception. The answer must depend on the construction of certain statutes and statutory rules and the question is therefore a question of law. Then is it a question under one of the Acts mentioned in s. 14 or an amending Act? Neither the Municipal Corporations Act, 1882, nor the Local Government Act, 1894, are, or could have been, expressly mentioned in s. 14 of the Act of 1881, but connection between those Acts and the Act of 1881 is established through s. 242, sub-s. 3, of the Act of 1882, which provides that "Where any Act passed before this Act . . . . refers to the Municipal Corporations Act, 1835, or any Act amending it . . . . the reference shall be deemed to be to this Act or to the corresponding provision of this Act." Therefore we have to see whether the Judicature Act, 1881, being an Act passed before the Act of 1882, refers to the Act of 1835 or any Act amending it. The Act of 1881 does not refer to the Act of 1835, but it does

refer to the Corrupt Practices (Municipal Elections) Act, 1872, which amended the Act of 1835 by repealing some of its sections and replacing them by other enactments. Therefore the Act of 1882 is to be treated as included among the statutes mentioned in s. 14 of the Judicature Act, 1881. Upon this point indeed we are bound by *Line* v. *Warren* (1) and *Beresford-Hope* v. *Lady Sandhurst* (2), where the Court of Appeal held that the Act of 1882 is to be so treated. Having included the Act of 1882 within s. 14 of the Judicature Act, 1881, we must further include any Act amending the Act of 1882.

Here arises the only point on which I have felt any doubt. The Act of 1882 did not apply to the election of guardians at all; therefore without further legislation this question could not be said to be a question under the Act of 1882. Did the further legislation amend the Act of 1882? Part IV. of that Act was extended and applied to the election of guardians by s. 48, sub-s. 3, of the Local Government Act, 1894, subject to adaptations, alterations, and exceptions made by rules framed by the Local Government Board. I had some doubt whether to extend the operation of an Act is to amend the Act. But on consideration I think it is too technical to say that it is not. If this is the right view then the question arises under both Acts, the Act of 1882 and the Act of 1894, which amends the Act of 1882; and both these Acts, or appropriate provisions of them, are to be taken as included in s. 14 of the Act of 1881.

The only remaining point is this: The order of the Divisional Court from which the petitioner is attempting to appeal is an interlocutory and not a final order; therefore, he contends, s. 14 of the Judicature Act, 1881, has no application; and he cites *Lord Monkswell* v. *Thompson* (3) in support of this contention. I have felt some difficulty about that case. In 1880 there was the decision in *Harmon* v. *Park* (4) that in an interlocutory matter an appeal lay to the Court of Appeal without leave. At that time there was no

(1) 14 Q. B. D. 548.
(2) 23 Q. B. D. 79.
(3) [1898] 1 Q. B. 353.
(4) 6 Q. B. D. 323.

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enactment in force similar to s. 14 of the Judicature Act, 1881. The question came up again in *Lord Monkswell* v. *Thompson* (1) upon an appeal from an order that the votes of certain candidates should be recounted, the appellant insisting that the votes of all the candidates should be recounted. The Court heard the appeal, basing their decision on *Harmon* v. *Park.* (2) No reference was made to s. 14 of the Judicature Act, 1881; yet if the question there under appeal had been treated as a question of law, that section would have precluded the hearing of the appeal; and I think the explanation of the decision to hear the appeal must be that the question was treated as one of fact and not law. The decision was not put on that ground by the Court, but on the ground that there was no distinction between the case before them and *Harmon* v. *Park.* (2) But their attention was not called to *Shaw* v. *Reckitt* (3) in which A. L. Smith L.J. declined to follow *Harmon* v. *Park* (2) as having been decided before the Judicature Act, 1881. Therefore *Lord Monkswell* v. *Thompson* (1) cannot be relied on to justify any exception being made in favour of interlocutory proceedings, and that case may require reconsideration if the point there decided comes up again for argument. For these reasons I agree that the preliminary objection succeeds and the appeal must be dismissed.

EVE J. I agree. It has been decided that the Municipal Corporations Act, 1882, is within s. 14 of the Judicature Act, 1881, and is to be deemed to be referred to therein because it is an Act amending the Corrupt Practices (Municipal Elections) Act, 1872, which is one of those expressly mentioned in the section. By parity of reasoning the Local Government Act, 1894, must also be treated as within the section. Part IV. of the Act of 1882 is the foundation of much subsequent legislation. It was amended by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, and s. 48, sub-s. 3, of the Act of 1894, in extending the provisions of Part IV. as

(1) [1898] 1 Q. B. 353. (2) 6 Q. B. D. 323.
(3) [1893] 2 Q. B. 59.

so amended to the election of guardians does so subject to certain adaptations, alterations, and exceptions, with the result that Part IV. of the Act of 1882 applies, not in its original but in an amended form, to the election of guardians. In my view the Act of 1894 is itself an Act which must be deemed to be referred to in s. 14 of the Judicature Act for these reasons. When Part IV. of the Act of 1882 was amended by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, this last mentioned Act became an Act referred to in s. 14. The Act of 1894 not only applies Part IV. of the Act of 1882 as amended, but further amends the Act of 1884 by repealing s. 36, sub-s. 1, of that Act. Therefore in my opinion the Act of 1894 must be treated as an Act amending the Act of 1882, and therefore as one referred to in s. 14. If that be so it is unnecessary to consider whether the point decided by the Divisional Court arises under the Act of 1882 and the Act of 1894, or under the Act of 1894 alone. It is clearly a point of law, and therefore I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Rowe & Maw.*
Solicitors for respondent: *Samuel Price, Sons & Robertson.*

W. H. G.

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Oct. 19.

[IN THE COURT OF APPEAL.]

HUCKELL *v.* SAINTEY.

Landlord and Tenant—Agricultural Holding—Lease—Agreement to plant Fruit Trees—Compensation for Improvement—Agricultural Holdings Act, 1908 (8 *Edw.* 7, *c.* 28), *s.* 1, *sub-s.* 1—*Agriculture Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 76), *Sch. I.—Agriculture* (*Amendment*) *Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 17), *s.* 1, *sub-s.* 3.

Sect. 1, sub-s. 1, of the Agricultural Holdings Act, 1908, as amended by s. 29 of the Agriculture Act, 1920, and further amended by s. 1, sub-s. 3, of the Agriculture (Amendment) Act, 1921, is to be read thus: "Where a tenant of a holding has made thereon any improvement comprised in the First Schedule to this Act he shall, subject as in this Act mentioned and in a case where the contract of tenancy was made on or after January 1, 1921, then whether the improvement was or was not an improvement which he was required to make by the terms of his tenancy, be entitled, at the determination of a tenancy, on quitting his holding to obtain from the landlord as compensation under this Act for the improvement such sum as fairly represents the value of the improvement to an incoming tenant."

A contract of tenancy made in 1906 for a term of fifteen years contained an agreement by the tenant to plant half the land with fruit trees and fruit bushes within the first four years, and the rest with fruit trees within the first ten years of letting. The tenant planted trees and bushes in accordance with the agreement. At the end of the tenancy he claimed compensation for the improvement thus made:—

Held, that he was not entitled to compensation, the improvement being one which he was required to make by the terms of his tenancy and the contract of tenancy having been made before January 1, 1921.

Appeal from the decision of the county court judge of Cambridgeshire upon the following case stated under s. 13 of the Agricultural Holdings Act, 1908.

1. By a contract of tenancy (1) dated August 8, 1906, and made between the landlord of the one part and the tenant of the other part the landlord demised unto the tenant a plot of arable land or garden ground containing one acre (more or less) situate in the parish of Longstanton in the county of Cambridge for a term of fifteen years from October 11, 1906, at the yearly rent of 5*l.*

(1) The contract of tenancy purported to be a lease for fifteen years, but it was not under seal.

2. The contract of tenancy contained a covenant by the tenant with the landlord as follows: To plant half the said land or garden ground with top and bottom fruit trees or in place of bottom fruit trees or bushes to plant raspberry canes within the first four years of letting And the lessee shall plant the remaining half of the said land or garden ground with top fruit trees all of the best description now or then in use and all at his own cost the last named top planting to be completed and ended within the first ten years of letting and the lessee may if he choose complete the bottom planting of the said remaining half of the said land or garden ground in manner above described And the lessee at his own cost and charges will well and sufficiently repair maintain support and cleanse the fences drains ditches and appurtenances when and where and as often as need shall require. And shall plant and cultivate the said land or garden ground in a good and husbandlike way and manner and according to the best system now in use in the district And the said lessee shall not nor will during or at the end or sooner determination of the said term damage remove take or carry away any or either of the fruit trees bushes or canes asparagus or any such permanent plant planted and growing thereon or to be planted in the said garden land or premises during the said term but a full plant to be left upon the said premises and for that purpose will make new planting when and as often as need shall require by reason of the decay or dying off of the said existing or subsisting plant but may remove any building erected on the said premises by the lessee.

3. The contract of tenancy contained an agreement that no part of the Agricultural Holdings Act of 1875 or later should apply to the lease and that no claim should be made nor any compensation given at the expiration or sooner determination of the lease for any improvements that might have been made on the said holding during the term stated.

4. At the hearing of the arbitration before me on January 10, 1922, it was agreed by the said parties that the tenant had planted the trees and bushes on the said premises in accordance

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with the covenant by him contained in the said contract of tenancy.

5. The tenant contends :—

(*a*) That on the true construction of the agreement of tenancy and ss. 1, 5 and 42 of the Agricultural Holdings Act, 1908, and Schs. I. and III. to that Act he is entitled to compensation for planting the fruit trees and fruit bushes hereinbefore mentioned ;

. . . .

(*e*) That even when the agreement of tenancy imposes an obligation on a tenant to carry out an improvement for which compensation is payable under the said Act he is entitled on the determination of the tenancy on quitting the holding to be paid the value of such improvement to an incoming tenant.

6. The landlord contends :—

(i.) That the tenant having planted no trees or bushes other than those which he was under obligation to plant under the contract of tenancy has no valid claim for any compensation ;

(ii.) That no right to compensation is given by the Agricultural Holdings Act, 1908, s. 1, sub-s. 1, to a tenant in respect of an improvement which he is required to make by the terms of his tenancy : *Earl Galloway* v. *M'Clelland* (1) ;

(iii.) That it was the object of the Legislature to overcome the decision of *Earl Galloway* v. *M'Clelland* (1) with regard to agreements entered into after January 1, 1921, by the amendment to s. 1, sub-s. 1, of the Agricultural Holdings Act, 1908, contained in Sch. I. to the Agriculture Act, 1920, and that the effect of the amendment was also more clearly defined by s. 1, sub-s. 3, of the Agriculture (Amendment) Act, 1921 (2) ;

(iv.) That the right to compensation for improvements which he is bound under his agreement to effect was first given to a tenant by Sch. I. to the

(1) 1915 S. C. 1062.

(2) For note (2) see facing page.

Agriculture Act, 1920, and s. 1, sub-s. 3, of the Agriculture (Amendment) Act, 1921, and then only to a tenant whose tenancy commenced after January 1, 1921;

(v.) That the contract of tenancy containing the covenant to plant as aforesaid did not constitute a consent in writing by the landlord to an improvement required by s. 2 of the Agricultural Holdings Act, 1908 . . . .;

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(2) Agricultural Holdings Act, 1908, s. 1, sub-s. 1: "Where a tenant of a holding has made thereon any improvement comprised in the First Schedule to this Act he shall, subject as in this Act mentioned, be entitled, at the determination of a tenancy, on quitting his holding to obtain from the landlord as compensation under this Act for the improvement such sum as fairly represents the value of the improvement to an incoming tenant."

The First Schedule contains Part I., Improvements to which Consent of Landlord is required, including (11) Planting of orchards or fruit bushes. (12) Protecting young fruit trees. Part III. Improvements in respect of which Consent of or Notice to Landlord is not required. "(27) Repairs to buildings, being buildings necessary for the proper cultivation or working of the holding, other than repairs which the tenant is himself under an obligation to execute."

Agriculture Act, 1920, s. 29: "The amendments in the second column of the First Schedule to this Act (which relate to minor details), shall be made in the provisions of the Agricultural Holdings Act, 1908, and the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919, specified in the first column of that Schedule."

THE FIRST SCHEDULE.

MINOR AMENDMENTS OF AGRICULTURAL HOLDINGS ACT, 1908.

Enactment to be amended.	Nature of Amendment.
Section 1 ..	In sub-s. 1, after the word "Act," where that word first occurs, there shall be inserted the words "and the tenancy was entered upon after January 1, 1921, whether the improvement was or was not an improvement which he was required to make by the terms of his tenancy. . . ."

Agriculture (Amendment) Act, 1921, s. 1, sub-s. 3: The First Schedule to the Agriculture Act, 1920 (which sets out certain minor amendments to be made in the Agricultural Holdings Act, 1908), shall have effect, and be deemed always to have had effect, as though the words "In sub-s. 1 after the words 'in this Act mentioned' there shall be inserted the words 'and in a case where the contract of tenancy was made on or after January 1, 1921, then'" were therein substituted for the words "In sub-s. 1 after the word 'Act' where that word first occurs, there shall be inserted the words 'and the tenancy was entered upon after January 1, 1921.'"

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7. The questions of law submitted for the opinion of the Court are :—

1. Whether the tenant is entitled to compensation for improvements which he is bound to effect by covenant contained in his contract of tenancy dated August 8, 1906, notwithstanding the decision in *Earl Galloway* v. *M'Clelland* (1) ;
2. Whether the contract of tenancy constituted a consent in writing by the landlord within the meaning of s. 2 of the Agricultural Holdings Act, 1908, the contract having been entered into before January 1, 1921 ;
3. Whether the right to compensation for improvements effected under the terms of the contract of tenancy was first given by the Agriculture Act, 1920, and by s. 1, sub-s. 3, of the Agriculture (Amendment) Act, 1921, to a tenant whose contract of tenancy was entered into after January 1, 1921.

The county court judge answered these questions as follows :—

1. No ; the tenant is not entitled to claim compensation for improvements which he was bound to effect by the covenant contained in his contract of tenancy dated August 8, 1906.

2. In view of my first finding this question does not arise.

3. Yes. The right to claim compensation for improvements which the tenant was bound to effect by the covenant contained in his contract of tenancy was first granted by the Agriculture Act, 1920, and the Agriculture (Amendment) Act, 1921, and then only when the contract of tenancy was entered upon after January 1, 1921.

The tenant appealed.

Carrol Romer (*W. Allen* with him) for the appellant.
W. Hanbury Aggs for the respondent.

BANKES L.J. This is an appeal from the decision of the county court judge of Cambridgeshire upon a case stated by

(1) 1915 S. C. 1062.

an arbitrator under the Agricultural Holdings Act, 1908, as amended by the Agriculture Acts of 1920 and 1921. It raises the question whether the appellant, who was the tenant of an acre of land under an agreement in writing made in 1906 for fifteen years, is at the end of the term entitled to compensation for fruit trees and fruit bushes planted by him in pursuance of a term in the agreement placing him under an obligation to plant them. The landlord took the point that under the statutes the tenant is not entitled to any compensation at all. The arbitrator stated his award in the form of a special case raising questions which the county court judge has answered adversely to the tenant. The tenant appeals.

The difficulty is caused by the method of drafting used in the Acts of 1920 and 1921, a method by which previous legislation is amended by introducing fresh words and substituting new phrases for the words and phrases of the Act under amendment. The original enactment is s. 1 of the Act of 1908. It enacted that where a tenant of a holding has made any improvement comprised in the First Schedule he shall be entitled on leaving the holding at the end of the tenancy to obtain from the landlord the compensation mentioned in the section. The improvement for which the appellant claims compensation is to be found in Sch. I., which comprises improvements to which the consent of the landlord is required. Inasmuch as these improvements were made under the agreement between the landlord and the tenant it cannot be said that the landlord did not consent to them.

The question whether under the Act of 1908 a tenant could obtain compensation for improvements which he was bound by covenant to make, gave rise to a difference of opinion in the Court of Session in Scotland. We have been referred to two cases of which the first was decided in the tenant's favour and the second by a majority in a contrary sense. That was in 1915. In England no amending legislation was passed until 1920. By the Agriculture Act of that year it was provided that the amendment in the second column of

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the Schedule to the Act should be made in the Act of 1908. The amendment specified in the Schedule is an amendment to s. 1. The second column says that in sub-s. 1 there shall be inserted certain words after the word "Act" where that word first occurs, that is to say after the words "First Schedule to this Act." The words to be inserted are "and the tenancy was entered upon after January 1, 1921, whether the improvement was or was not an improvement which he was required to make by the terms of his tenancy." So the legislation stood in the year 1921. In that year a further amendment was made whereby the words "and the tenancy was entered into after January 1, 1921," were changed into "and in a case where the contract of tenancy was made on or after January 1, 1921, then", and being so changed were shifted from the position in s. 1 of the Act of 1908 next after the words "First Schedule to this Act," to a fresh position next after the words "subject as in this Act mentioned." The Act of 1921 makes no express reference to the words "whether the improvement was or was not an improvement which he was required to make by the terms of his tenancy." Those words must stand somewhere by virtue of the Act of 1920; and now in my opinion s. 1, sub-s. 1, of the Act of 1908 with its amendments must be read thus: "Where a tenant of a holding has made thereon any improvement comprised in the First Schedule to this Act he shall, subject as in this Act mentioned"—here must be inserted the words in s. 1, sub-s. 3, of the Act of 1921—"and in a case where the contract of tenancy was made on or after January 1, 1921, then"—here come the unamended words in Sch. I. to the Act of 1920—"whether the improvement was or was not an improvement which he was required to make by the terms of his tenancy"—then s. 1, sub-s. 1, of the Act of 1908 continues in its original words "be entitled at the determination of his tenancy, on quitting his holding to obtain from the landlord as compensation under this Act for the improvement such sum as fairly represents the value of the improvement to an incoming tenant." It is impossible to dive into the mind of the Legislature and say why these amendments were

made; we can only interpret the words used in the Acts. As I read them it is impossible to give them the construction which the appellant seeks to put upon them. To do so it would be necessary to ignore the words introduced by the Act of 1921 in the position they are to occupy and to read this legislation as having from the first conferred a right to compensation for these improvements indifferently whether the contract of tenancy was made after January 1, 1921, or on or before that date. Whether the result is to be regretted I know not. As the legislation stands it confines the right of compensation to cases where the contract of tenancy is entered upon on or after January 1, 1921. The appeal must be dismissed.

SCRUTTON L.J. The question in this difficult and complicated case is whether a tenant is entitled to compensation for improvements which he is bound by the terms of his lease to make. If the case had turned on the Act of 1908 alone I should have wished to give it further consideration, though by comity the Court might have followed the decision of the Court of Session; for it might have been argued that if the tenant has made any improvement under s. 1 of that Act he would be entitled to compensation, provided the written consent of the landlord had been obtained under s. 2. But we have to construe the Act of 1908 as amended by the Acts of 1920 and 1921. In *M'Quater* v. *Fergusson* (1) the Court of Session in Scotland decided that a tenant might have compensation for the unexhausted value of artificial manure though he was required by the terms of his lease to apply artificial manure to the land. In *Earl Galloway* v. *M'Clelland* (2) the tenant claimed compensation for laying down temporary pasture. He had agreed in his lease to crop and cultivate the lands according to the rules of good husbandry and follow a six-shift rotation, which included an obligation to leave at the determination of the tenancy as large an area in temporary pasture as there was at the beginning. He claimed compensation for the temporary

(1) 1911 S. C. 640. (2) 1915 S. C. 1062.

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pasture laid down in accordance with this agreement. After a hearing before the Second Division, and a further hearing before seven judges, the case was considered by the whole Court. In the result seven judges held that the tenant could not have compensation for improvements which were required by the lease, as against six judges who held that he could. That case was followed in *Findlay* v. *Munro* (1), which decided that a tenant cannot claim compensation for merely performing the covenants in his lease. In 1920 the matter came to the attention of Parliament. First the Act of 1920 was passed, which by altering s. 1, sub-s. 1, of the Act of 1908, conferred on the tenant the right to compensation for the improvements comprised in the First Schedule to that Act whether the improvement was or was not an improvement which he was required to make by the terms of his lease. The Act of 1920 failed to effect all that was intended; it only allowed the additional compensation to tenants whose leases or agreements for tenancy were made after 1920. The Act of 1921 was apparently passed to remedy this defect. It is drawn in terms which leave its meaning extremely doubtful. I think the Act of 1908 with its amendments now reads: "Where a tenant of a holding has made thereon any improvement comprised in the First Schedule to this Act, he shall subject as in this Act mentioned and in a case where the contract of tenancy was made on or after January 1, 1921, then whether the improvement was or was not an improvement which he was required to make by the terms of his tenancy, be entitled at the determination of his tenancy, on quitting his holding," etc., following the terms of s. 1, sub-s. 1, of the Act of 1908. I can only read that enactment as approving the decision of the Court of Session up to and including December 31, 1920, but as providing that where the contract of tenancy is made on or after January 1, 1921, it shall be immaterial for this purpose whether the improvement is or is not one which the tenant is bound to make by the terms of the contract. I find it impossible to read the legislation of 1920 and 1921 as

(1) 1917 S. C. 419.

disagreeing with the decision of the Court of Session. I can only read it as providing that in contracts entered upon before 1921 if the improvement in question is one which the tenant is required by the contract to make he cannot have compensation for it; but if the contract is made on or after January 1, 1921, then whether the improvement is required by the contract or not the tenant can have compensation.

EVE J. I agree. The answers to questions 1 and 3 asked by the special case depend on the construction of s. 1, sub-s. 1, of the Act of 1908 as amended by the Act of 1920 and reamended by the Act of 1921. I agree with the other members of the Court in their view of the resultant effect of s. 1, sub-s. 1, of the Act of 1908, and the amendments. In approaching the construction of those amendments it is permissible to consider that there had been in existence for five years a decision of a competent Court that under the Act of 1908 a tenant was not entitled to compensation for an improvement effected in pursuance of a covenant or agreement with his landlord. The Legislature determined to mitigate the effect of that decision. They might have avoided its effect altogether by including improvements made under contracts of tenancy entered into after the Act of 1908. Whether that would have been a reasonable thing to do is immaterial. The Legislature has stopped short of doing it, and by a compromise it has altered the existing law where the contract of tenancy was made on or after January 1, 1921, but has declined to alter the position of tenants under contracts of tenancy made before that date.

Appeal dismissed.

Solicitors for appellant: *Buxton Ashton & Son, for King & Mettem, Cambridge.*

Solicitors for respondent: *Goodman, Saunders & Co., for H. C. Squires, Cambridge.*

W. H. G.

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1922
Oct. 23.

[IN THE COURT OF APPEAL.]

BOWKETT *v.* FULLERS UNITED ELECTRIC WORKS, LIMITED.

[1922. B. 4566.]

Company—Arrangement with Creditors—Judgment—Staying Proceedings—Discretion—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 140.

By s. 140 of the Companies (Consolidation) Act, 1908, "At any time after the presentation of a petition for winding up, and before a winding-up order has been made, the company, or any creditor or contributory, may—(*a*) where any action or proceeding against the company is pending in the High Court or Court of Appeal . . . . apply to the Court in which the action or proceeding is pending for a stay of proceedings therein . . . . and the Court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit":—

Held, that, in the absence of special circumstances, the Court ought to exercise the discretion so vested in it by staying or restraining the proceedings with a view of securing equal distribution of the assets among creditors of the same class.

A company being unable to meet its obligations a petition was on August 18, 1920, presented to wind it up. Proposals for a scheme of reconstruction and arrangement with creditors were then made and a scheme was in process of preparation with a view to obtaining the sanction of the Court thereto under s. 120 of the Companies (Consolidation) Act, 1908. On August 28, 1920, a creditor brought an action and got judgment for 41*l.* and was about to issue execution. The company issued a summons under s. 140 of the Act to stay execution on the judgment.

Held, there being no special circumstances in the case, that the execution ought to be stayed.

Order of Greer J. in chambers reversed.

Appeal from an order of Greer J. in chambers affirming an order of a master refusing to stay further proceedings in the action in the circumstances following.

The defendant company carried on business at Chadwell Heath in the county of Essex as manufacturers of wire and cable for telegraphs and telephones.

The authorized capital of the company was 378,794*l.* 8*s.* divided into 98,493 ordinary shares of 1*l.* each, 151,507 ordinary shares of 4*s.* each, and 250,000 cumulative preference shares of 1*l.* each. All the preference shares, except fourteen,

which had been forfeited, and all the ordinary shares of 4*s.* had been issued and fully paid up. The 98,493 ordinary shares of 1*l.* were unissued. The total capital paid up amounted to 280,301*l.* 8*s.* The company had issued short-term notes for a total sum of 200,000*l.* upon the terms that the notes should become immediately payable if execution either by writ or by the appointment of a receiver were levied on any part of the property or assets charged and the debt for which the levy was made were not paid off in seven days.

Owing to depression in trade the company was unable to meet its obligations. The secretary, who was also a director, of the company stated in an affidavit that the bankers of the company were creditors for over 160,000*l.* and debenture holders for 150,000*l.*, that on August 18, 1920, a petition to wind up the company had been lodged and that a scheme was being prepared for reconstruction of the company with a view to obtaining the sanction of the Court under s. 120 of the Companies (Consolidation) Act, 1908. (1)

On August 28 the plaintiff brought an action for 41*l.* 2*s.* 6*d.* for goods sold and delivered and on October 2 obtained leave to sign, and on October 6 signed, final judgment for that amount. The secretary further stated that the company's bankers had only refrained from appointing a receiver in order to assist the scheme of reconstruction, and that it would

(1) Companies (Consolidation) Act, 1908, s. 120, sub-s. 1: "Where a compromise or arrangement is proposed between a company and its creditors or any class of them . . . . the Court may, on the application in a summary way of the company or of any creditor . . . . of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors . . . . to be summoned in such manner as the Court directs."

Sub-s. 2: "If a majority in number representing three-fourths in value of the creditors or class of creditors . . . . present either in person or by proxy at the meeting agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or class of creditors . . . . and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company."

Sub-s. 3: "In this section the expression 'company' means any company liable to be wound up under this Act."

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be extremely difficult to carry it through if any creditor were allowed to issue execution against the company's goods and so obtain a preference over the general body of creditors.

The defendant company issued a summons to stay further proceedings in the plaintiff's action under s. 140 of the Companies (Consolidation) Act, 1908. (1) The Master in chambers made an order on October 9, 1922, that if notice of appeal were served there should be a stay of execution until the hearing of the appeal, but otherwise that no order should be made upon the application except that the costs should be the plaintiff's in any event. The company appealed to the judge in chambers. Greer J., the judge in chambers, dismissed the appeal.

The company appealed.

Maugham K.C. and *Cartwright Sharp* for the appellants. It is the usual practice to stay actions and proceedings against a company when a petition has been presented to wind it up. "In the absence of special circumstances in favour of the execution creditor the Court will have regard to the object of the winding-up proceedings, viz., an equal distribution among all creditors, and will stay proceedings under the writ if execution be not actually issued before the presentation of the petition": Buckley on Companies, 9th ed. (1909), p. 332. If there are no special circumstances, e.g., undue delay in applying for a stay, the discretion of the Court ought to be exercised by staying the proceedings. A scheme of arrangement is a form of winding up. Before the Companies Act, 1907, a scheme could only be ratified if the company was in process of being wound up. Consequently the same principles should apply whether the company is being wound up by or under the supervision of the Court or by means of a scheme.

J. B. Lindon for the respondent. No order has been made upon the petition to wind up the company and no scheme has been agreed upon. There may or may not be

(1) See headnote.

an order, and there may or may not be a scheme. In these circumstances the Court has a discretion whether it will stay further proceedings on the respondent's judgment. A judgment creditor is prima facie entitled to obtain the fruits of his judgment by means of execution: *Booth* v. *Walkden Spinning Co.* (1); and the Court should therefore exercise its discretion by allowing the execution to proceed. Where a petition is presented bona fide for the purpose of winding up a company there the Court is right in preserving equality among creditors, but where the petition is a mere prelude to a scheme of arrangement, there a creditor who has been vigilant should not lose the reward of his diligence.

Counsel were not called on in reply.

BANKES L.J. In this case after a petition had been presented to wind up the company, the plaintiff issued a writ for 41*l.* against the company and got judgment and was about to levy execution. The company then took out a summons to stay further proceedings by the plaintiff on the ground that the petition had been presented and a scheme of arrangement was being proposed for acceptance by the general body of creditors. The question is whether in these circumstances the further proceedings by the plaintiff should be stayed.

Before the Companies (Consolidation) Act, 1908, it was not possible to introduce a scheme of arrangement until after a winding-up order had been made, in which case under s. 87 of the Act of 1862 (which is s. 142 of the present Act) there could be no doubt of the duty of the Court to stay proceedings by individual creditors. But the Act of 1908 altered the law in this respect, and now a scheme of arrangement may be proposed and sanctioned, although no petition has been presented to wind up the company. If a petition is presented then under s. 140 the Court has power to stay or restrain pending actions or proceedings, and in my opinion the Court has the same power whether the petition results in a winding-up order or in the approval of a scheme of arrangement. The general policy of the Court in exercising this

(1) [1909] 2 K. B. 368.

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jurisdiction, when a petition has been presented which may result in a winding-up order or a scheme, is to secure that no creditor shall thenceforward gain priority over others of his class, and when an application is made to stay proceedings under s. 140 very exceptional circumstances must exist to justify the Court in refusing to accede to the application, because if the plaintiff's action is not stayed he will get payment in full while if his action is stayed he will take his place properly among other creditors of his class. I cannot see any exceptional circumstances in the present case. To allow the plaintiff to proceed would be in effect, during the interval between the presentation of a petition and the working out of a scheme of arrangement, to allow certain creditors to help themselves out of the assets of the company in priority to some others in a less fortunate position. No doubt the Court has a discretion whether it will stay a plaintiff's action, but it is against the policy of the Court to exercise that discretion by allowing the plaintiff to proceed except in very special circumstances. Here it ought to be exercised in favour of the application. The appeal must be allowed and the proceedings stayed.

SCRUTTON L.J. I agree. The statutory powers conferred upon the Court by the Act of 1908 require us to allow this appeal in view of the practice of the Court. Sect. 120 of the Act provides that where an arrangement is proposed between a company and its creditors the Court may, on the application of the company or any creditor, order a meeting of the creditors to be summoned; and if a majority representing three-fourths in value of the creditors present in person or by proxy at the meeting agree to an arrangement the arrangement if sanctioned by the Court is binding on the creditors. The result is that a legal creditor may have part of his rights taken away by a sufficient majority of creditors of his class. Furthermore when a petition has been presented power is given by s. 140 to the High Court to stay proceedings pending in that Court so as to prevent a scramble by the creditors while the Court is considering whether it will wind up the

company or not, and to insure that all creditors of the same class shall obtain equal terms. If there is no petition to wind up the Court cannot stay proceedings on the ground that meetings are being held and in the mere expectation or hope that a petition will be presented; but where a petition has been presented Parliament has given the Court power to stay proceedings pending therein. In the present case the Court has that power and the power must be exercised unless there are special circumstances to induce the Court to hold its hand. If there were special circumstances the Court of Appeal would be slow to interfere with the discretion of the judge in chambers, but something must be shown beyond a judgment and an impending execution to induce the Court to depart from what I understand to be the ordinary practice in the Chancery Division, which is to stay proceedings so that all creditors of the same class may be dealt with on equal terms.

EVE J. I agree. It is to be observed that a compromise or arrangement between a company and its creditors under s. 120 of the Act of 1908 may be brought about either without or in the course of liquidation proceedings. Under the Joint Stock Companies Arrangement Act, 1870, a winding up either voluntary or by or under the supervision of the Court was a necessary preliminary to any such compromise or arrangement; but by s. 38 of the Companies Act, 1907, it was provided that the Act of 1870 should apply to a company not in course of being wound up in like manner as it applied to a company in course of being wound up; and s. 120 of the Act of 1908 reproduces in substance the joint effect of the Act of 1870 and s. 38 of the Act of 1907. A composition therefore may be arranged either by resorting to winding up or without so doing, but experience has shown that it is often advisable in the interest alike of the company and of the creditors or class of creditors with whom a compromise is contemplated to present a petition to the Court for winding up in order to protect the assets and prevent any individual member of the class obtaining any preference over the other

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members by prosecuting proceedings to recover his debt; and this is effected by an application to stay his proceedings under s. 140. I merely add these observations to show that there is no substance in the point that the petition in this case was a mere pretence to cloak the real object of the petitioner. It is a perfectly legitimate means of securing equality amongst the creditors with whom the composition is intended to be made. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Clifford Turner & Hopton.*
Solicitors for respondent: *Cochrane & Cripwell.*

W. H. G.

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MORRIS v. TOLMAN.

Criminal Law—Misdemeanour—Aiding and Abetting—Acquittal of Principal—Another Person charged as Aider and Abettor—Whether capable of being convicted—Roads Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 72), *s.* 8, *sub-s.* 3.

By s. 8, sub-s. 3, of the Roads Act, 1920: "Where a licence has been taken out as for a vehicle to be used solely for a certain purpose and the vehicle is at any time during the period for which the licence is in force used for some other purpose, the person so using the vehicle shall, if the rate of duty chargeable in respect of a licence for a vehicle used for that other purpose is higher than the rate chargeable in respect of the licence held by him, be liable to an excise penalty. . . . ."

An information was preferred against the owner of a motor vehicle charging that he had on a certain day used it for a purpose other than that for which it was licensed and chargeable at a higher rate of duty, and also charging the respondent with aiding and abetting the commission of the offence. The justices dismissed the information against the owner, and being of opinion that having dismissed it as against him, they had no power to convict the respondent of aiding and abetting; they also dismissed the information as against the respondent:—

Held, that the language of s. 8, sub-s. 3, showed that it was limited to persons holding a licence for a vehicle, and that inasmuch as the respondent was not the holder of the licence, he was not liable to be convicted.

CASE stated by justices of Chichester.

At a Court of summary jurisdiction an information was preferred by the appellant, under the Roads Act, 1920, against

one Frederick Jefferies and the respondent charging that Jefferies on April 17, 1922, did unlawfully use a motor vehicle for a purpose other than that for which it was licensed, the purpose for which the vehicle was then used being chargeable at a higher rate of duty and that the respondent was then and there present aiding and abetting Jefferies to commit the offence.

At the hearing the following facts were proved :—

Frederick Jefferies was the registered owner of a mechanically propelled commercial goods vehicle, to wit, a Ford van, and Reginald Tolman was a driver in his employ. Jefferies held a licence for the vehicle, and he had declared that it would be used solely for the conveyance of goods in the course of trade, and had paid the duty—namely, 16*l.*, for such licence. The licence duty for the vehicle, if used for private purposes, would be 23*l.* On April 17, 1922, Tolman was driving the vehicle in the city of Chichester and was there stopped by a police constable of the West Sussex Constabulary. In the vehicle were three children, two women and two men, including the respondent. Tolman was questioned by the constable, and his attention was drawn to the fact that the vehicle was licensed for commercial use only, and he then made and signed the following statement : "Mr. Jefferies said I could take the car to have a ride round, and we are out on a joy ride just to see some relations." No evidence was called for the defence.

The justices being of opinion that there was not sufficient evidence to prove that Jefferies used the vehicle for a purpose other than that for which it was licensed, dismissed the information against him.

On behalf of the appellant it was contended that, although the case had been dismissed against Jefferies, the respondent could be convicted either as a principal or as an aider and abettor.

On the part of the respondent it was contended that in law it was impossible to convict the respondent of aiding and abetting when the case against the principal had been dismissed.

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The justices were of opinion that, having dismissed the information against the principal, it was impossible for them to convict the aider and abettor, and they dismissed the information against the respondent.

The question for the opinion of the Court was whether the justices came to a correct determination and decision. (1)

Norman Birkett for the appellant. The question is whether, where justices have dismissed an information against a principal, they are bound also to dismiss it against an aider and abettor. It is submitted that they are not so bound. The question depends on the language of s. 8, sub-s. 3, of the Roads Act, 1920. In *Du Cros* v. *Lambourne* (2) it was held that, under s. 5 of the Summary Jurisdiction Act, 1848, a person who had aided and abetted the commission of an offence punishable on summary conviction might be convicted upon an information charging him with having committed the offence as principal offender. Lord Alverstone C.J. said: "In the case of crimes other than felonies there is no distinction between a principal offender and aiders and abettors; as was pointed out by Blackburn J. in *Reg.* v. *Burton* (3) there is no such person as an accessory in point of law in a misdemeanour." In *Rex* v. *Daily Mirror Newspapers, Ld. Rex* v. *Glover* (4) a limited company was charged with an offence under s. 34 of the Representation of the People Act, 1918, and a servant of the company with aiding and abetting them. An indictment was presented against the defendants accordingly, and they were both convicted. On appeal it was held that as against the defendant company the conviction

(1) The Roads Act, 1920, s. 8, sub-s. 3: "Where a licence has been taken out as for a vehicle to be used solely for a certain purpose and the vehicle is at any time during the period for which the licence is in force used for some other purpose, the person so using the vehicle shall, if the rate of duty chargeable in respect of a licence for a vehicle used for that other purpose is higher than the rate chargeable in respect of the licence held by him, be liable to an excise penalty of an amount equal to three times the difference between the duty actually paid on the licence and the duty payable on a licence appropriate to a vehicle used for that other purpose or twenty pounds, whichever amount is the greater."

(2) [1907] 1 K. B. 40, 43.

(3) (1875) 13 Cox, C. C. 71, 75.

(4) [1922] 2 K. B. 530.

must be quashed, but that it did not follow that the conviction must also be quashed as against the other defendant and the appeal was dismissed as against him.

[He also referred to *Rex* v. *Wood. Ex parte Anderson.* (1)]

Gentle for the respondent. The respondent committed no offence under s. 8, sub-s. 3, of the Act. He did not hold the licence, and was not compellable to hold one. The Act, being a penal one, must be strictly construed. A person cannot aid and abet an offence which has not in fact been committed. The language of s. 8, sub-s. 3, shows that no one can be convicted under the sub-section but the holder of the licence.

[He referred to *Gould & Co.* v. *Houghton.* (2)]

Norman Birkett replied.

LORD HEWART C.J. This is a case stated by justices arising out of proceedings against two persons upon an information under s. 8, sub-s. 3, of the Roads Act, 1920, for unlawfully using a motor vehicle for a purpose other than that for which it was licensed. The respondent, Tolman, was charged with aiding and abetting one Frederick Jefferies to commit the offence. The justices came to the conclusion that Jefferies, who was the owner of the vehicle, was not guilty, and they dismissed the information as against him. The question then arose whether the respondent could be convicted either as principal or as aider and abettor, and the justices were of opinion that, having dismissed the information as against the principal, it was impossible for them to convict another person as aider and abettor, and they accordingly dismissed the information as against the respondent. The question is whether they came to a correct decision. [His Lordship referred to the facts stated in the case and continued :] The question is whether it was open to the justices to convict the respondent. They were of opinion that it was impossible for them to do so. If that was intended to be a general opinion, it cannot be supported. It does not in the least follow because a principal is acquitted that another person may not be convicted for aiding and abetting. There

(1) [1922] 1 K. B. 674. (2) [1921] 1 K. B. 509.

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Lord Hewart C.J.

are obviously cases where such a conviction is possible. But the opinion of the justices was, I think, merely a finding with reference to this particular case. In considering whether this Court should give directions to the justices to convict the respondent, we must have regard to the question which has been discussed—namely, whether on this particular charge, where the holder of the licence had been acquitted, a person who never was the holder of a licence can be convicted. In misdemeanour there is no distinction between a principal and an aider and abettor. The person charged may be convicted either as principal or as aider and abettor, but the wording of s. 8, sub-s. 3, of this Act is peculiar, and we have to construe the sub-section, not as it might have been drawn, but as it is. [His Lordship read the sub-section and continued:] In this case if the aider and abettor were to be convicted, after the dismissal of the information against the principal, it must be upon the footing that the respondent was a principal. Was it then possible for the respondent to commit the offence described in s. 8, sub-s. 3, when the owner of the licence did not commit the offence? The words of the sub-section "the person so using the vehicle" are, no doubt, wide enough to cover the use of the vehicle by a person other than the holder of the licence, but when one looks at the rest of the sub-section, it is clear that it is confined to the owner of the licence. The words used are "the licence held by him." The respondent did not hold the licence. Again, if he had been convicted, to what penalty would he have been liable? The only penalty imposed is an excise penalty to be calculated with reference to the difference between the rate of duty paid by the offender and that which he ought to have paid. It is therefore apparent that if he had been charged as a principal offender he could not have been convicted. He was, no doubt, using the vehicle for a purpose other than that for which it was licensed, but the licence was not held by him. The respondent must be treated as if he were a principal, and as it is not possible that he could have been convicted under s. 8, sub-s. 3, as a principal, he cannot, in my opinion, be convicted as an aider and abettor.

No doubt another question might, in a different case, arise, as was pointed out by Avory J. in *Rex* v. *Wood. Ex parte Anderson* (1), under s. 13, sub-s. 1, if an information were preferred for using a vehicle for which a licence was not in force. If a vehicle has a commercial licence, but is used for a private purpose, it might be argued that that is using an unlicensed vehicle, but it is not necessary for us to express a final opinion on that point in this case. For the reasons I have stated I have come, with regret, to the conclusion that the justices were right, and that this appeal must be dismissed.

AVORY J. I am of the same opinion. The justices proceeded on the principle that a person charged as an aider and abettor cannot be convicted if the principal is acquitted. As an abstract proposition that cannot be supported, for in all offences below felony any person aiding and abetting or counselling and procuring, the commission of the offence may be convicted either as principal or as aider and abettor: *Reg.* v. *Burton.* (2) But here the charge was under s. 8, sub-s. 3, of the Roads Act, 1920. It is said that the only person who can commit the offence is the person who holds the licence, and the words of the sub-section support that contention. Upon the facts, no doubt the vehicle was being used by the respondent for a purpose other than that for which the licence was taken out, and the rate of duty chargeable for a licence for a vehicle used for that other purpose is higher than the rate paid by the holder. But in order to convict the respondent it would be necessary to substitute in sub-s. 3 the words, "the licence which has been taken out" for the words "the licence held by him," and the statute being a penal one, there is no justification for doing so. Moreover, in order to convict, it would be necessary to show that the respondent was aiding the principal, but a person cannot aid another in doing something which that other has not done. Again, it is impossible to hold that the respondent was using the vehicle in a way to bring him within s. 8, sub-s. 3, for this reason. It is necessary to look at the words "if the rate of

(1) [1922] 1 K. B. 674. (2) 13 Cox, C. C. 71.

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duty . . . . is higher than the rate chargeable in respect of the licence held by him." If, as in this case, no licence was held by the respondent, there is no means of arriving at the penalty. It would also be necessary to show that the respondent knew that the purpose for which he was using the vehicle was other than that for which the licence was taken out. The principal would be presumed to know that. I agree, therefore, that the justices have unconsciously come to a right conclusion.

As to s. 13 of the Roads Act, 1920, in *Rex* v. *Wood. Ex parte Anderson* (1) the Court came to the conclusion that the case was not covered by the words of s. 8, sub-s. 3. But Lord Trevethin C.J. said: "I am by no means prepared to say that the licence taken out was the right licence to take out if it was intended to use this vehicle at any time as a hackney carriage, and it may be that the appellant would be liable under s. 13 of the Roads Act. But that is not the question we have to decide." And I said: "I think it is open to argument that a person who has taken out a licence under para. 6, and who during its currency uses the vehicle as a hackney carriage, does not hold a licence under the Finance Act, 1920, and is therefore a person using a vehicle 'for which a licence under the Finance Act, 1920 . . . . is not in force' within the meaning of s. 13." I agree that this appeal must be dismissed.

SANKEY J. I agree for the same reasons, and with the same regret as my Lord.

Appeal dismissed.

Solicitors for appellant: *Walmsley & Stansbury, for J. E. Dell & Loader, Southwick.*

Solicitor for respondent: *Harvey Clifton, for Plumbridge & Meaden, Brighton.*

(1) [1922] 1 K. B. 674, 679.

F. C.

[IN THE COURT OF APPEAL.]

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SHELDRICK *v.* SOUTH AFRICAN BREWERIES, LIMITED.

[1921. S. 6,487.]

Revenue—Income Tax—Dominion Income Tax—Company—Preference Shareholders—Fixed Dividend—Benefit of Relief—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Rules applicable to all Schedules, r.* 20—*Finance Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *s.* 27, *sub-ss.* 1, 5.

By r. 20 of the Rules applicable to all Schedules under the Income Tax Act, 1918: "The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share . . . . and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto."

By the Finance Act, 1920, s. 27, sub-s. 1, it is provided that where a company has paid income tax in one of the Dominions, relief shall be given to it in respect of the tax payable in the United Kingdom to the extent of that Dominion tax, provided that the relief shall not be more than one-half the appropriate rate of United Kingdom tax.

By sub-s. 5: "Where under r. 20 of the General Rules applicable to Schedules A, B, C, D and E, a body of persons is entitled to deduct income tax from any dividends, tax shall not in any case be deducted at a rate exceeding the rate of the United Kingdom income tax as reduced by any relief from that tax given under this section in respect of any payment of Dominion income tax."

A company incorporated under the Companies Acts, 1862 to 1892, and carrying on business mainly in South Africa, claimed the right to deduct from the dividends of the preference shareholders United Kingdom income tax at the full rate, without making any reduction in the rate of that tax corresponding with the relief which the company had itself been allowed under sub-s. 1 of s. 27 in respect of Dominion income tax:—

Held, that the words "any dividends" in sub-s. 5 of s. 27 of the Act of 1920 were clear and unambiguous and included all dividends whether preferential or ordinary, and that the company was not entitled to deduct from the preferential dividends income tax at a rate exceeding the United Kingdom income tax as reduced by the relief from that tax conferred upon the company under s. 27, sub-s. 1, of the Act in respect of any payment by the company of Dominion income tax.

Wakefield v. *Whiteaway, Laidlaw & Co.* [1922] 1 Ch. 200 overruled.

Decision of Sankey J. reversed.

APPEAL from a decision of Sankey J. upon a special case stated for the opinion of the Court.

The defendant company was registered under the

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Companies Acts, 1862 to 1892, on May 15, 1895. Its capital was 2,500,000*l.*, divided into 2,500,000 shares of 1*l.* each, of which 1,000,000 were preference shares and 1,500,000 were ordinary shares. The preference shares were entitled to a cumulative preferential dividend at the rate of 5 per cent. per annum on the amount for the time being paid up on such shares.

The plaintiff was the holder of 620 preference shares and 250 ordinary shares, in each case fully paid up.

On December 7, 1920, the directors of the company declared and on January 15, 1921, paid an interim dividend in respect of the company's financial year April 1, 1920, to March 31, 1921, at the rate of 2½ per cent. upon the preference shares and of 1*s.* per share on the ordinary shares of the company. The company in paying the interim dividend on the preference shares deducted income tax at the rate of 4*s.* in the pound. The interim dividend on the ordinary shares was paid "free of income tax."

In the report dated July 18, 1921, issued by the directors of the company to the shareholders, accompanied by the balance sheet and profit and loss and net revenue accounts in respect of the year ending March 31, 1921, the directors recommended a final dividend at the rate of 2½ per cent. upon the preference shares (making 5 per cent. for the year) and of 1*s.* 3*d.* per share on the ordinary shares (making 2*s.* 3*d.* for the year), and at the general meeting of the company, held on July 26, 1921, dividends were declared on the preference and ordinary shares of the company on the basis aforesaid as recommended by the directors.

On paying to the plaintiff the final dividend on July 26, 1921, on the preference shares of the company held by him, the company deducted income tax thereon at the rate of 6*s.* in the pound, and the final dividend on the ordinary shares of the company was paid "free of income tax."

The company had since its incorporation carried on business in South Africa, and was liable under the statutes of the Union of South Africa to pay income tax on its profits. The company had proved to the satisfaction of the Special

Commissioners that it had paid income tax under the last mentioned statutes upon its profits at the rate of 2*s.* in the pound in such manner as to entitle it to relief under s. 27, sub-s. 1, of the Finance Act, 1920, from United Kingdom income tax payable in respect of the financial year 1920–21.

In respect of the financial year 1920–21 the company was assessed to United Kingdom income tax in the sum of 72,052*l.* 16*s.*, being at the rate of 6*s.* in the pound on its assessable profits and gains. The company duly made application to have allowed to it the relief granted by s. 27, sub-s. 1, of the Finance Act, 1920, in respect of the income tax so paid in South Africa, and on July 26, 1921, the relief as applied for had been allowed, with the result that the United Kingdom income tax was reduced by the relief given under s. 27 of the Finance Act, 1920, to 4*s.* in the pound, and such reduced rate was only payable by the company on its assessable profits and gains for the fiscal year ending April 5, 1921, it being agreed for the purposes of the special case that such fiscal year was the period in respect of and out of the profits of which the dividend in question was paid.

The plaintiff contended that the company was not entitled to deduct income tax from the dividend paid on the preference shares of the company at a rate exceeding 4*s.* in the pound by reason of the express provision in s. 27, sub-s. 5, of the Finance Act, 1920, but the company contended that notwithstanding that section it was entitled to deduct income tax from such dividends at the full rate of 6*s.* in the pound.

The question (inter alia) submitted for the opinion of the Court was: Whether in paying to the plaintiff on July 26, 1921, a final dividend of 2½ per cent. per annum for the financial year ending March 31, 1921, upon the preference shares of the defendant company held by the plaintiff the defendant company was entitled to deduct therefrom income tax at the rate of 6*s.* in the pound.

Sankey J., following the decision of Sargant J. in *Wakefield* v. *Whiteaway, Laidlaw & Co.* (1), held upon the construction of s. 27, sub-s. 5, of the Finance Act, 1920, that the

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company was entitled to deduct from the preference dividends income tax at the rate of 6*s.* in the pound.

The plaintiff appealed. The appeal was heard on October 25, 26, 1922.

Hon. Sir William Finlay K.C. and *R. P. Hills* for the appellant. Sankey J. followed the decision of Sargant J. in *Wakefield* v. *Whiteaway, Laidlaw & Co.* (1) and the real question in this appeal is whether that decision was right or wrong. The submission is that it was wrong.

Under the Income Tax Acts a company is assessed to income tax upon its total profits: Income Tax Act, 1842, ss. 40 and 54. The whole of the profits is assessed in the hands of the company, and the company deducts a proportionate part from the dividends paid to the shareholders. It is said that for this purpose the company is the agent for the shareholders. Rule 1 of the General Rules applicable to all Schedules under the Income Tax Act, 1918, is equivalent to s. 40, and r. 20 corresponds to s. 54 of the Income Tax Act, 1842.

Complications were introduced by the Finance Act, 1916, the object of which Act was to give certain relief to companies carrying on business partly in this country and partly in a colony. That was to a certain extent carried out by s. 43 of the Act of 1916, which was reproduced by s. 55 of the Act of 1918. Then came the Finance Act, 1920, which by s. 27, sub-s. 1, reproduces s. 43 of the Act of 1916. It provides: "If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income at a rate thereon to be determined as follows:—

(*a*) if the Dominion rate of tax does not exceed one-half of the appropriate rate of United Kingdom tax, the rate

(1) [1922] 1 Ch. 200.

at which relief is to be given shall be the Dominion rate of tax.

(*b*) In any other case the rate at which relief is to be given shall be one-half of the appropriate rate of United Kingdom tax."

The meaning of that sub-section is that where a person pays tax in the United Kingdom and also upon the same income pays a Dominion tax, he is entitled to repayment of the Dominion tax up to the half of the United Kingdom tax. Sub-sect. 5 is the material provision in this case. "Where under Rule 20 of the General Rules applicable to Schedules A, B, C, D and E, a body of persons is entitled to deduct income tax from any dividends, tax shall not in any case be deducted at a rate exceeding the rate the United Kingdom income tax as reduced by any relief from that tax given under this section in respect of Dominion income tax." That sub-section is not a relieving sub-section but is an amendment of r. 20.

Upon the Act of 1916, Astbury J. decided in *Rover* v. *South African Breweries* (1) that the true view of the law was that the company could only deduct from its dividends income tax at the reduced rate.

In *New Zealand and Australian Land Co.* v. *Scottish Union and National Insurance Co.* (2) the same point was raised and Astbury J.'s decision was dissented from. The Scottish case went to the House of Lords and was affirmed. (3) Then came the Finance Act, 1920, which became law on August 4, 1920. It is submitted that s. 27, sub-s. 5, of that Act is clear. The result of that legislation is to restore the decision in *Rover* v. *South African Breweries.* (1)

If the decision of Sankey J. in this case is right the amendment in s. 27, sub-s. 5, of the Finance Act, 1920, made no alteration at all in the law. The appellant's case depends on the generality of the language of the sub-section. The illustration given by Sargant J. in *Wakefield* v. *Whiteaway,*

(1) [1918] 2 Ch. 233.
(2) (1919) 57 S. L. R. 15.
(3) Sub nom. *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* [1921] 1 A. C. 172.

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Laidlaw & Co. (1) of the case of a company incorporated and carrying on business in Australia fails altogether. In that case r. 20 of the Rules applicable to all Schedules under the Income Tax Act, 1918, does not apply. The rule there applicable would be r. 7 of the Miscellaneous Rules applicable to Sch. D. The shareholder would there have obtained relief, because he would have paid both Dominion and United Kingdom income tax. The tax is on the dividend and not on the profits of the company. The words of sub-s. 5 of s. 27 of the Act of 1920 being, as it is submitted, plain, the Court cannot have regard to the history of the enactment, or to any supposed defect in the former legislation which it was intended to cure: *Reg.* v. *Bishop of London.* (2)

Assuming that "dividend" in r. 20 of the Rules applicable to all Schedules means both preference and ordinary dividend, it must, it is submitted, have the same meaning in s. 27 of the Act of 1920.

If the decision of Sargant J. in *Wakefield* v. *Whiteaway, Laidlaw & Co.* (3) is right, it would follow that where a company has paid Dominion tax of 4*s.* in the pound and has deducted United Kingdom tax of 6*s.* in the pound, the Revenue authorities have to repay the 2*s.* in the pound which they have not received to a shareholder whose income is less than 200*l.*

[WARRINGTON L.J. Sect. 27 provides a new code for deductions and makes no distinction between preference and ordinary dividends.

YOUNGER L.J. referred to the observations of Viscount Cave in *Inland Revenue Commissioners* v. *Blott.* (4)]

Latter K.C. and *Cyril King* for the respondent company. Sub-s. 1 of s. 27 reproduces s. 43 of the Finance Act, 1916. Sub-sect. 3 relates to super-tax and is applicable only to individuals. Sub-sect. 4 deals with the new method of arriving at profits. By sub-s. 5 the right of deduction allowed to and exercised by a company in a sense excuses the shareholder and thereby discharges his obligation. The rate referred

(1) [1922] 1 Ch. 200, 209.
(2) (1889) 24 Q. B. D. 213, 224.
(3) [1922] 1 Ch. 200.
(4) [1921] 2 A. C. 171, 201.

to in the section is the rate applicable to dividends and has no reference to the liability of the shareholder.

[WARRINGTON L.J. We have nothing to do with the liability of the shareholder to the Revenue. The relief given by s. 27, sub-s. 5, is not in respect of dividends but of the profits of the company.]

The natural way of reading of the section is to read "rate" as meaning the rate applicable to dividends. The appropriate rate in the case of dividends is 6*s*. in the pound, but if a shareholder has paid Dominion tax it is 4*s*. in the pound. The person who obtains the relief is the person who has paid the two taxes. Sub-sect. 5 of s. 27 makes no alteration in the law; it merely provides machinery for carrying out its provisions.

The position of a preference shareholder is this. His liability arises under Sch. D. Under s. 1 of the Income Tax Act, 1918, he is liable to pay income tax at the rate for the year. By s. 14, sub-s. 1, of the Finance Act, 1920, the tax for the year 1920–21 was at the rate of 6*s*. The company pays the tax as a taxpayer as stated by Viscount Cave in *Inland Revenue Commissioners* v. *Blott*. (1) See also per Scrutton L.J. in *Bradbury* v. *English Sewing Cotton Co*. (2) It was not intended by sub-s. 5 of s. 27, which merely provided machinery, to relieve a shareholder if he had not paid Dominion tax. The Legislature cannot be supposed to have been ignorant of a well-known decision at the time the Act of 1920 was passed, and it cannot be imputed to it with that knowledge that it intended to alter the law on this important question without some definite expression of intention: *Cope* v. *Doherty*. (3)

Before s. 27 of the Finance Act, 1920, the right of a company to relief was under s. 43 of the Finance Act, 1916, and s. 55 of the Income Tax Act, 1918, under which a company having paid two taxes obtained relief. That is substantially repeated by s. 27, sub-s. 1. The company having obtained relief could have put the money into its coffers and there was nothing at that time which required the company to pass on the relief

(1) [1921] 2 A. C. 171, 201. (2) [1922] 2 K. B. 569.
(3) (1858) 2 De G. & J. 614, 624.

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to its shareholders. The Dominion tax was an expense of its business: *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (1) Sub-sect. 5 of s. 27 was enacted for the purpose of passing on the relief given to the company to the shareholder, but the shareholder can only claim it if he has borne some part of the tax which the company receives back under sub-s. 1. If he has not borne the tax he obtains no greater right by reason of sub-s. 5. The word "dividends" in sub-s. 5 should, it is submitted, be read with a limited meaning. The deduction at the reduced rate must be from the dividend of a shareholder who has paid or borne both taxes—namely, the ordinary shareholder.

Hon. Sir William Finlay K.C. was not called upon to reply.

LORD STERNDALE M.R. This is nominally an appeal from a decision of Sankey J., but it really is an appeal from a decision of Sargant J., and was stated to be so by Sankey J. in the Court below, with the assent, I think, of everybody. I regret to say that I do not take the same view of the effect of the provisions of the Act with which we have to deal as that taken by Sargant J. I need not state the facts at any length. They are set out in detail in the special case, and I think it is enough to say that the plaintiff is a preference shareholder in the defendant company, which is a registered company. In January, 1921, an interim dividend was paid on the preference shares of 2½ per cent., and in paying that interim dividend the company deducted from the full amount of the dividend a sum of 4*s.* in the pound, which was the difference between the full United Kingdom tax and the Dominion tax which the company had also had to pay because it carried on its business in South Africa.

In July, 1921, a final dividend was declared bringing up the amount of the dividend to 5 per cent., which was the limit of the dividend upon the preference shares. In doing that the company deducted from the gross amount of the dividend, if I may call it so, 6*s.* in the pound, being the entire United Kingdom tax, and the question is whether under the

(1) [1921] 1 A. C. 172.

provisions of the statutes which regulate these matters it was right in the first instance in only charging 4*s*. or right in the second instance in charging the full United Kingdom tax of 6*s*.

There are very few statutory provisions, I am thankful to say, to which I shall have to refer on this matter. The first is r. 20 of the General Rules applicable to all Schedules under the Income Tax Act, 1918, a consolidating Act, which is in these terms: "The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto." Those are the profits that are made in the Dominions. The company carries on business there, and all its profits, I think, are made by carrying on business in South Africa. Therefore there is charged upon them before division the full 6*s*. of the United Kingdom income tax. There is also charged, because the company is carrying on business in South Africa, the Dominion tax of 2*s*.; that is, I mean, there would be charged if there were no other provisions. Then the rule continues: "and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto."

It will be seen that the taxation in the first instance is not upon the amount of the dividend at all but upon the amount of the profits, and it may very well be that the amount that is distributed in dividends is very much less than the amount of the profits made by the company. The profits may be carried forward or carried to reserve or a number of other things may be done with them.

Looking at this rule alone, I think it means this—that the company has to pay income tax on its profits before division, and when it divides any portion of those profits, then it can deduct an appropriate part, which in this case is the proportionate part, from the amount distributed in dividends and deduct it, of course, from the dividends paid to each particular shareholder. That is the way in which the taxation is effected.

Now, in the Finance Act, 1920, these provisions are contained in s. 27. Sub-s. 1 is: "If any person"—and "any

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person" includes "any company"—"who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income"—of course the company here has to pay it upon the whole of its income—"proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income"—that this company of course can do and has done—"he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income at a rate thereon to be determined as follows: (*a*) if the Dominion rate of tax does not exceed one-half of the appropriate rate of United Kingdom tax, the rate at which relief is to be given shall be the Dominion rate of tax." In this case the Dominion rate of tax was 2*s*. and that of the United Kingdom 6*s*., and therefore under this provision the company was entitled to relief to the extent of 2*s*. and would only have to pay 4*s*.

Then there is this provision (sub-s. 2): "Where a person has not established his claim to relief under this section for any year of assessment before the first day of January in that year, the relief shall be granted by way of repayment of tax." That merely means that if he has not been in time to get a remission on the amount paid and has had to pay the full amount, he shall be repaid the amount of the relief to which he is entitled.

Then comes an important sub-section (sub-s. 5), which is as follows: "Where under Rule 20 of the General Rules applicable to Schedules A, B, C, D and E, a body of persons is entitled to deduct income tax from any dividends, tax shall not in any case be deducted at a rate exceeding the rate of the United Kingdom income tax as reduced by any relief from that tax given under this section in respect of any payment of Dominion income tax." Those words are, I should have thought, in their natural and ordinary sense as plain as words could be, and unless there is something in the rest of the legislation to control and limit them, there can be no doubt as to what they mean. "Where a body of

persons is entitled to deduct income tax from any dividends." The words "any dividends" to my mind mean any dividends, although so to read them, according to counsel for the respondent company, is somewhat a twisting of words, and include the dividends on the preference shares with which we are dealing in this case. "Tax shall not in any case"—that seems to me to mean "in any case," but if the construction contended for by the respondent company is right, so far from meaning "any case" it means "in some cases," and that a very restrictive class of cases, because only two cases have been suggested, and although I asked for a third, I received no answer in the affirmative. Only two cases have been suggested in which this sub-section will operate at all if the respondent company's construction is correct. I do not say that there are not any more, but only two have been suggested to us. "Tax shall not in any case be deducted at a rate exceeding the rate of the United Kingdom income tax as reduced by any relief from that tax given under this section in respect of any payment of Dominion income tax."

Now, relief has been given under this section. The relief that has been given under this section is the relief that has been given to the company under sub-s. 1 of this same s. 27, and it seems therefore that, in the ordinary reasonable and grammatical meaning of the language, it is as clear as possible that the respondent company, having received relief in respect of the payment of Dominion income tax to the extent of 2*s*., cannot deduct more than 6*s*. less 2*s*.—namely, 4*s*.

Let us look at the way in which it has to be read if the respondent company's contention is right. The meaning seems to me clear and requires nothing to be read into the sub-section at all, but the respondents' contention is this—that the sub-section only limits the amount which the company, here called "a body of persons," may deduct from the dividend of the shareholder in two cases—namely, in the case of ordinary shareholders and in the case where the shareholder himself can show that he has paid double income tax upon the same amount of income—namely, the amount of the dividend. I found it very difficult at first to conceive a

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case in which a shareholder would himself have paid double income tax, but I am satisfied now that there are cases. Two, as I say, have been suggested to us, but I have failed to discover a third at present. I do not say there is not one. If that be the meaning, you have to read the sub-section in this way: "Where under Rule 20 of the General Rules applicable to all Schedules a body of persons is entitled to deduct income tax from any dividends payable to a shareholder who has paid double income tax himself"—these words are not here at all—"tax shall not in that case"—or you might say "in any case" or "in any such case"—"be deducted at a rate exceeding the rate of the United Kingdom income tax as reduced by any relief given in respect of that dividend or that tax under this section in respect of any payment of Dominion income tax."

Now, "in respect of that dividend" or "in respect of that income" are words which do not occur in the sub-section at all and they have to be read into it, just as the other words which I have mentioned have to be read into it, after the word "dividends." It seems to me that that is a forced and unnatural construction of the sub-section. We have had given to us by learned counsel for the respondent company a good many reasons why the Legislature should have confined this limitation upon the power of deduction to the case where the shareholder, from whose dividend the amount is being deducted, is in the position I have mentioned of having paid double income tax himself. That is for the Legislature. I do not think we ought to consider any such matters at all. We have to look at the sub-section and see what it means. If it be ambiguous, perhaps it is legitimate to look at the history of the legislation and the object of that legislation. If the words be clear and unambiguous, as I think these words are, then I do not think that we ought to look at either the history of the legislation or what we think ought to have been the legislation; we have only to look and see what the legislation is.

Therefore I base my judgment entirely upon the reading of the sub-section, apart from any considerations of its history

or anything else. But it is certainly somewhat striking, when you come to consider the meaning of the words used in the sub-section, to see what the law was at the time the sub-section came into force; I do not say at the time the sub-section was first thought of or first came under consideration. There had been a decision of Astbury J. in *Rover* v. *South African Breweries* (1), of which the headnote, which accurately, I think, states the effect of the judgment, is this: "An English company that, owing to its having paid Colonial income tax, has obtained a rebate or repayment of 1*s.* 6*d.* in the pound on its British income tax under the Finance Act, 1916, s. 43, cannot deduct full British income tax from its dividends under the Income Tax Act, 1842, s. 54, but can only deduct the net British income tax it has actually borne."

At that time when that decision was given sub-s. 5 was not in existence. That decision was held to be wrong by the House of Lords in *Scottish Union National Insurance Co.* v. *New Zealand and Australian Land Co.* (2), and the latter part of the headnote in that case, which again I think is accurate, is this: "The company was not bound or entitled to deduct at the net rate to be ascertained by taking into account the amount of the tax repaid to the company under s. 43 of the Finance Act, 1916."

If you omit the word "not" in that headnote, which states the opinion of the House of Lords in that case, you have sub-s. 5 almost in terms: "The company was bound and entitled to deduct the net rate to be ascertained by taking into account the amount of the tax repaid to the company under s. 43 of the Finance Act, 1916." I think that is a rather striking circumstance, but I do not base my decision upon it. I base it upon the plain words of the sub-section, which I think are not equivocal and which, if they do not convey the intention of the Legislature, should be altered by the Legislature so as to express what it did intend.

I think the appeal should be allowed and judgment given for the plaintiff with costs here and below.

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WARRINGTON L.J. I am of the same opinion. The question to be decided is whether under the provisions of s. 27 of the Finance Act, 1920, the respondent company is entitled to deduct from preference dividends tax at the full rate of the United Kingdom income tax, or whether it is entitled to deduct only tax at the reduced rate arrived at after giving the relief provided for by that section in respect of the payment by the company of the Dominion income tax.

The company's profits are largely, if not entirely, made in South Africa. On those profits it has in South Africa to pay Dominion income tax. Being an English company it would also have to pay United Kingdom income tax on those profits, and but for recent legislation the United Kingdom income tax which it would thus have to pay would be at the ordinary rate at which other taxpayers are charged.

Now it would appear that to require persons or companies earning profits in a Dominion and charged with Dominion income tax to pay United Kingdom income tax at the full rate was a hardship, and provisions were made first by s. 43 of the Finance Act, 1916, and repeated in s. 55 of the Income Tax Act, 1918, for relief in such cases.

The effect of s. 43 of the Finance Act, 1916, was this: "If any person who has paid, by deduction or otherwise, United Kingdom income tax for the current income tax year on any part of his income" at a certain rate, "proves to the satisfaction of the Special Commissioners that he has also paid any Colonial income tax in respect of the same part of his income, he shall be entitled to repayment" of a certain part of the United Kingdom income tax so paid. I need not say what that part was, as it is immaterial.

In the case of a company it is the company which directly pays the tax upon its profits. The shareholders bear their due proportion of the tax by a power given to the company by r. 20, which I will read directly, of deducting the due proportion of the tax from the dividends which the company pays. And accordingly for the purpose of s. 43 it is the company and not the shareholders of the company who

is the person who has paid the income tax and is entitled to relief.

In that legislation up to and including the Income Tax Act, 1918, no provision was made, with reference to the power of the company to deduct tax from dividends paid to its shareholders, for passing on to shareholders the relief given by those sections to the company itself. That being at that time the state of things with reference to the double tax, the Dominion income tax and British income tax, the Finance Act, 1920, was passed. That Act contains a long section, s. 27, comprising eight sub-sections, and it seems to me to constitute a complete code, so far as the intentions of the Legislature then went for regulating the way in which relief should be given against payment of double income tax, the Dominion income tax and the United Kingdom income tax. It begins with a provision in effect identical with that of s. 43 of the Act of 1916. [His Lordship read sub-s. 1 of s. 27 and continued :] In this, which as I have said I regard as the code which the Legislature then thought fit to frame for this purpose, there is contained for the first time a provision regulating the power of the company to deduct from the dividends it pays to its shareholders a proportionate part of the income tax which it has itself paid. The provision is sub-s. 5 : [His Lordship read the sub-section and continued :]

Now before I proceed to state what in my opinion is the meaning of that sub-section, I think it is necessary to turn back to r. 20 of the General Rules applicable to all Schedules under the Income Tax Act, 1918. Rule 20 is in these terms : [His Lordship read the rule and continued :] In the case of a company, that rule operates in this way. The profits or gains to be charged on the company are computed at the full amount of the payment made in dividend. When the company comes to pay the dividend to the shareholder it deducts from that dividend the proportionate amount of the income tax which it has itself paid. That means, of course, in effect, to take the case of United Kingdom income tax at 6*s*. in the pound, that if the company has been charged at 6*s*. in the pound on the whole of its profits and it divides any

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part of those profits amongst its shareholders, or a class of its shareholders, it deducts from the amount so paid tax at the rate of 6*s*. in the pound. It is to be observed, therefore, that under r. 20 the right which the company has is to deduct the tax or a proportionate part of the tax which it has paid, the tax appropriate to the dividend it has paid. For the purposes of those companies which pay Dominion income tax and obtain relief that has to be read as provided for by sub-s. 5 of s. 27 of the Act of 1920: "Where under Rule 20 [a company] is entitled to deduct income tax from any dividends"—now it is quite clear that under r. 20, and nobody denies it, the company is entitled to deduct income tax from its preferential dividends, and therefore prima facie the sub-section applies. The sub-section continues: "tax shall not in any case be deducted at a rate exceeding" what I may shortly call the reduced rate, the rate reduced by the application of the relief in sub-s. 1. If, in the first words in sub-s. 5, "any dividends" includes preferential dividends, as it certainly does, I really fail to see any reason why the concluding words of the sub-section should not also apply to the deduction of tax from any dividend, including preferential dividends. The real truth is that the object of the sub-section, read literally, seems to be to fill up a gap which was left by the Legislature up to that time, and to modify, having regard to the relief, the amount which by r. 20 the company was entitled to deduct. It is not to deduct the United Kingdom income tax at the full rate, but at the reduced rate.

But now it is said: "You are not to read this sub-section literally, as I think it is to be read. I cannot help saying that I think a tendency has crept in in recent years of trying to induce the Court, sometimes I am afraid successfully, to apply a somewhat subtle and ingenious mode of construction, to Revenue Acts in particular, in order to make them accord with what it is suggested was the object of the Legislature in passing them. The business of the Court is to say what is the meaning of the words which the Legislature has used. If the Court gives to these words a meaning which, when brought to the attention of the Legislature, is found not to be what was

meant, the Legislature must alter it. The Court has to say what is the meaning of the words used, and nothing more.

Now after those remarks I have only this to say. We are asked, in construing this sub-s. 5 of s. 27, to read into it words which would confine the relief given by the sub-section to cases in which the shareholder in question from whom the deduction is sought to be made has himself borne or paid the income tax. The section says nothing about that. It simply in general terms modifies the amount of the tax which the company is entitled to deduct under r. 20; and if r. 20 applies to the particular case I cannot see how we are entitled to say that it is not affected by this sub-section. It is not disputed that it is r. 20 under which the deduction here is made by the company, and, if that is so, then I think the company can only deduct the modified amount. With all respect to Sargant J., and to Sankey J., who followed his decision, I think both these decisions were incorrect, and that the decision of Sankey J. must be reversed and that of Sargant J. overruled.

YOUNGER L.J. I am of the same opinion. With my learned colleagues I am quite unable to place upon s. 27 of the Act of 1920 in its relevant sub-sections any other construction than that which they have adopted.

Upon the facts of the present case this company being liable to pay both United Kingdom income tax and Dominion income tax has under the provisions of sub-s. 1 of that section in respect of its United Kingdom income tax obtained relief, with the result that that tax payable by the company in respect of the year with which we are concerned was reduced by the relief given from 6*s.* to 4*s.* in the pound. Here we are dealing with relief in respect of Dominion income tax extended to a company, and in this instance the problem to be solved is somewhat simplified by the fact that the relief given is of 2*s.* in respect of every pound of profit earned by the company and chargeable to income tax, I suppose because there were no profits of this company so chargeable other than those which had been earned in the Dominion.

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Now the company in respect of the dividend upon its preference shares for the year now in question was minded in pursuance of the liberty reserved to it by r. 20 of the General Rules under the Income Tax Act, 1918, to deduct from the dividend the amount of the income tax it had paid, which was "appropriate thereto," and on the footing that such was the appropriate amount the company in fact deducted from each pound of preference dividend the full sum of 6*s*. The question on this appeal is whether in view of sub-s. 5 of s. 27 of the Finance Act of 1920 the company was, in the circumstances above stated, entitled to deduct a larger sum than 4*s*. in the pound to which its own liability in respect of British income tax had been in fact reduced.

I will read again the words of the sub-section just to make plain the view I take as to its effect: "Where under r. 20 of the General Rules applicable to Schedules A, B, C, D and E, a body of persons is entitled to deduct income tax from any dividends, tax shall not in any case be deducted at a rate exceeding the rate of the United Kingdom income tax as reduced by any relief from that tax given under this section in respect of any payment of Dominion income tax."

Now applying that sub-section to the facts of this case what is the relief which has been given? The relief is relief to the company in respect of British income tax upon its profits and gains chargeable to income tax for the year, so that the company's chargeability for British income tax in respect of its entire assessable profits is reduced to a flat rate of 4*s*. in the pound. This sub-section therefore seems to me in plain terms to enact that whereas the company, apart from this question of Dominion income tax, would have been entitled had it been so minded to deduct from the dividends paid to its preference shareholders income tax at the rate of 6*s*. in the pound the company is required by this sub-section so to reduce the deduction that the amount so deducted shall not be greater than the appropriate British income tax (in this case there is no question as to the amount of that—it is 6*s*.) less the relief which has been given to the company in respect of it, which is 2*s*. in the pound. The result is that

in the present case the company was entitled to make no deduction from its preference dividend in excess of 4*s*. in the pound. There is, so far as I can see when you read the rule and sub-section together in the light of the facts with which we have here to deal, no room for qualification of the words of the sub-section in any direction. It is, I think, impossible on construction to escape from the above conclusion.

But, while I agree with the Lord Justice, if I may be allowed to say so, that it is not the province of the Court to do more than interpret the words of the Legislature where its words are plain, I would desire to say for my own part that even if it were permissible for us to embark upon the course which has been suggested by counsel for the company, and if we were at liberty to interpret the meaning of the sub-section by reference to its history, I should still reach the same conclusion as to its intent and effect. I should be of the opinion as a result of that inquiry that when the Legislature used these words in sub-s. 5 it meant by them what it seems to have said. While the actual extent of Lord Cave's judgment in *Inland Revenue Commissioners* v. *Blott* (1) may still be open to interpretation, prior to that case there was, I think, current a view enunciated in judgments of the highest authority going to show that when a company paid its British income tax, at least on profits equal in amount to its profits divided, it paid it on behalf of or as agent for its shareholders, and that it was by reason of that fact that a company was empowered, originally by s. 54 of the Act of 1842, and now by r. 20 of the Act of 1918 above referred to, to deduct from the dividend payable to its shareholders the appropriate part of the income tax which it was treated as having previously paid on the shareholders' behalf.

Swinfen Eady L.J., for instance, in *Brooke* v. *Inland Revenue Commissioners* (2), said: "Where the duty is paid by a company in respect of the gains and profits of its business it pays the income tax as agent for its shareholders, and in that way it is the shareholders, as the persons beneficially concerned, who bear the burden of the tax." Again Scrutton L.J. in

(1) [1921] 2 A. C. 171. (2) [1918] 1 K. B. 257, 267.

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the same case, when commenting on *Ashton Gas Co.* v. *Att.-Gen.* (1), said (2): "I am quite clear that a company in paying income tax at the source at any rate pays as agent of the shareholders." And Romer L.J. in *Att.-Gen.* v. *Ashton Gas Co.* (3) itself said: "If the profits, after deducting the income tax, have subsequently to be distributed amongst the members of the company, that income tax is not payable again by those members so far as they receive their share of the profits, because the income tax is to be taken as having been paid out of their profits and on their behalf."

In that state of the authorities *Rover* v. *South African Breweries* (4) to which reference has been made so frequently in the course of the argument was decided. The statute law applicable to it was contained in s. 54 of the Income Tax Act, 1842—in substance identical with r. 20, which in 1918 superseded it—and s. 43 of the Finance Act, 1916—in substance identical with s. 27, sub-s. 1, of the Finance Act, 1920. No provision corresponding to s. 27, sub-s. 5, of the Act of 1920 was then in existence.

In these circumstances Astbury J., relying on the principle that British income tax was paid by a company on behalf of its shareholders, decided without any help from the presence of such a provision as that now contained in s. 27, sub-s. 5, of the Act of 1920, that any remission of such taxation made in respect of a payment by the company of Dominion income tax must enure for the benefit of the same shareholders. Accordingly he came to the conclusion that under the law as it stood by virtue of the Acts of 1916 and 1918 the preference shareholder of this very company was entitled to relief from the British income tax on his dividend to the extent of the remission obtained by the company upon its own tax, inasmuch as the relief which had been obtained by the company must also be taken to have been obtained to the appropriate extent on his behalf.

A different view of the law as it then stood was taken however by the Scottish Courts in *New Zealand and Australian*

(1) [1906] A. C. 10.
(2) [1918] 1 K. B. 257, 270.
(3) [1904] 2 Ch. 621, 629.
(4) [1918] 2 Ch. 233.

Land Co. v. *Scottish Union and National Insurance Co.* (1), and that view was ultimately affirmed by the House of Lords on appeal (2) in a judgment delivered a few days before the Finance Act of 1920 became law. The view of the House of Lords on the statute law as it then stood was that Dominion income tax, being no other than an expense incurred by a company in the conduct of its Dominion business, that tax like any other similar expense could only properly be treated as diminishing pro tanto the company's profit fund otherwise divisible. Accordingly the only proper way of treating any remission of British income tax in respect of that Dominion payment was in the view of the House to apply the amount of it in the recoupment so far as it would go of the divisible fund. On that footing the preference shareholder who was not as such bearing any double tax was bound to submit to the retention from his dividend of the full appropriate British tax. And the House overruled *Rover* v. *South African Breweries.* (3)

Now it may well be, it almost certainly is, the fact that sub-s. 5 of s. 27 of the Finance Act of 1920 was already part of the Bill leading to that Act before the House of Lords' decision was given, although it must have been inserted after the decision in the Scottish Courts had been pronounced. It was inserted, that is to say, at a time when on the law as it had previously stood there was a conflict of opinion between the Scottish and the English Courts.

In these circumstances it is noticeable that the sub-section while, as my Lord has pointed out, appearing according to its language to state almost the opposite of that which was laid down by the House of Lords in the *Scottish Union Case* (2), affirmatively adopts in substance the decision of Astbury J. in the case to which I have referred. And rightly or wrongly —it may be we must now say wrongly, unless it desired to alter the law—the Legislature by enacting sub-s. 5 was, I cannot doubt, minded to apply the principle which had so

(1) 57 S. L. R. 15.
(2) Sub nom. *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* [1921] 1 A. C. 172.
(3) [1918] 2 Ch. 233.

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long been laid down by the Courts as the true one—namely, that a company's payment of British income tax being made on behalf of its shareholders it was right to give the same shareholders the benefit of this remission of that payment conceded to the company by the Legislature. That this was the intent of the Legislature is supported by the fact that there is in this sub-section no reference to an ordinary shareholder as distinguished from a preference shareholder; nor indeed could there on any view of the case properly be any such distinction, unless the exclusion from benefit of a preference shareholder were confined to one whose preference dividend was not in arrear. Pressed with that consideration counsel for the company, as I understood them, towards the conclusion of their argument no longer sought to support the judgment of Sargant J. in *Wakefield* v. *Whiteaway, Laidlaw & Co.* (1), which was specially based on a distinction between the two classes of shareholders: they felt no longer able to say on their final view of the sub-section that a preference shareholder was as such in any worse or other position than an ordinary shareholder, and they ultimately rested their argument upon the contention, that on the true view of the sub-section no shareholder whether preference or ordinary was entitled as such to the benefit of any remission of such income tax deduction unless he could affirmatively establish that he as an individual was personally liable to pay double income tax, in the Dominion and here, in which case, as I understood them, the relief would be properly handed on to him. There is, however, in my view, nothing in the section to justify the introduction of any such qualification, and, in my opinion, the true view of the wording justified both by its terms and its history is that the benefit has to be handed on to every shareholder in respect of his dividend, whatever be the nature of the dividend, and whatever be the character of the shareholder. Whether in the present case the shareholder remains ultimately liable in respect of the 2*s*. of United Kingdom income tax which has not been deducted from his dividend for the reason that

(1) [1922] 1 Ch. 200.

he is not personally liable also for Dominion income tax is a matter not expressly dealt with in this sub-section and will fall to be decided, as I should suppose, under the ordinary law applicable to that case.

For these reasons I am of opinion that the decision of Sargant J. in the case cited cannot be supported, and, to the extent to which Sankey J. felt himself bound to follow it, his decision also should, I think, be reversed and this appeal allowed.

Appeal allowed.

Solicitors for appellant: *Bircham & Co.*

Solicitors for respondent company: *Linklaters & Paines.*

W. I. C.

[IN THE COURT OF APPEAL.]

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KEMPLEY *v.* H. H. POOLE AND COMPANY, LIMITED.

Employer and Workman — Compensation — Award — Costs — Submission to Award with Denial of Liability—Sum in respect of both past and future Liability—Payment into Court—No greater Sum recovered by Applicant—Workmen's Compensation Rules, 1913–1917, *r.* 19, *sub-rr.* 1 (*a*) (*i.*), (*ii.*), 2, 8.

By r. 19, sub-r. 1, of the Workmen's Compensation Rules, 1913–1917, "A respondent who admits liability may at any time before the day fixed for proceeding with the arbitration, (*a*) Where the application is made by an injured workman, (i.) file with the registrar a notice that he submits to an award for the payment of a weekly sum, to be specified in such notice; or (ii.) file with the registrar a notice that he submits to an award for the payment of a lump sum, to be specified in the notice, which he considers to be sufficient to cover his liability in the circumstances of the case, and pay such sum into Court."

By sub-r. 2: "A respondent who denies liability may at any time before the day fixed for proceeding with the arbitration file a notice of submission to an award or pay money into Court in accordance with this rule."

On October 14, 1921, the applicant met with an accident arising out of and in the course of his employment by the respondents and was paid compensation down to April 21, 1922. On June 2, 1922, he filed a request in the Mayor's and City of London Court for arbitration claiming compensation of 1*l.* per week from April 21, 1922, and a declaration of liability. On June 22, 1922, the respondents filed their answer denying liability, but stating in their particulars (inter alia) that whilst denying

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that they were liable to any payment of compensation subsequent to April 21, 1922, they were ready and willing to submit to an award for payment of 1*l.* per week from that date up to June 21, 1922. They did not, however, pay any sum into Court. The assistant judge by his award ordered the respondents to pay to the applicant the sum of 8*l.* 13*s.* 4*d.*, being the amount of the weekly payments of 1*l.* per week calculated from April 21 to June 21, 1922, and to pay to the costs of the arbitration. On an appeal by the respondents from so much of the award as ordered them to pay the costs of the arbitration subsequent to the filing of their submission :—

Held, by Lord Sterndale M.R., and Warrington L.J., *dubitante* Younger L.J., that the award to which the respondents had submitted being in respect of both past and future payments did not fall within either para. (i.) or para. (ii.) of sub-r. 1 (*a*) of r. 19 of the Workmen's Compensation Rules, 1913–1917, and therefore that there was no obligation on the respondents to pay the money into Court.

Held, therefore, that as the applicant had not recovered a greater sum than that which the respondents had submitted to pay, the respondents were only liable under sub-r. 8 of r. 19 to pay the costs of the arbitration up to the date of the filing of their submission and that the award must be set aside so far as it ordered them to pay the costs subsequent to that date.

APPEAL from an award of the assistant judge of the Mayor's and City of London Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On October 14, 1921, the applicant met with an accident arising out of and in the course of the employment by the respondents and was paid compensation down to April 21, 1922.

On June 2, 1922, he filed a request for arbitration claiming compensation of 1*l.* per week from April 21, 1922, and a declaration of liability.

On June 22, 1922, the respondents filed their answer denying liability, but stating in their particulars (inter alia) that "whilst denying that they are liable for any payment of compensation subsequent to April 21, 1922, the respondents are ready and willing to submit to an award for payment of 1*l.* per week from that date up to June 21, 1922." They did not however pay any sum into Court.

On July 24, 1922, the assistant judge made his award, by which he ordered the respondents to pay to the applicant the sum of 8*l.* 13*s.* 4*d.*, being the amount of the weekly payments of 1*l.* per week calculated from April 21 to June 21,

1922, and further ordered them to pay to the registrar of the Court for the use of the applicant, his costs of and incident to the arbitration.

The respondents appealed from the award so far as it ordered them to pay the costs of the arbitration subsequent to the filing of their submission.

The appeal was heard on November 2, 1922.

F. S. Laskey for the appellants. The learned judge was wrong in awarding to the respondent costs from and after the date when the appellants gave notice of their submission to an award, having regard to the fact that the amount of compensation awarded by the learned judge was the same as the amount to an award of which the appellants notified themselves as being willing to submit: Workmen's Compensation Rules, 1913–1917, r. 19, sub-r. 8. (1)

[LORD STERNDALE M.R. Is there any power to pay into Court with a denial of liability ?]

Yes. Rule 19, sub-r. 2. (1)

(1) Workmen's Compensation Rules, 1913–1917, r. 19, sub-r. 1: "A respondent who admits liability may at any time before the day fixed for proceeding with the arbitration,

(*a*) Where the application is made by an injured workman,

(i.) file with the registrar a notice that he submits to an award for the payment of a weekly sum, to be specified in such notice; or

(ii.) file with the registrar a notice that he submits to an award for the payment of a lump sum, to be specified in the notice, which he considers to be sufficient to cover his liability in the circumstances of the case, and pay such sum into Court. . . . ."

Sub-r. 2: "A respondent who denies liability may at any time before the day fixed for proceeding with the arbitration file a notice of submission to an award or pay money into Court in accordance with this Rule, accompanied by a notice stating his name and address, and further stating that notwithstanding such submission or payment he desires his liability, together with as many copies of such notice as there are parties to whom notice of such submission or payment is to be sent."

Sub-r. 8: "In default of notice of acceptance by the applicant and all the respondents, the arbitration may proceed; but if no greater weekly payment or compensation is awarded than that which the respondent has submitted to pay or has paid into Court, such respondent shall not be liable to pay any further costs than such as he might have been ordered to pay if the weekly payment offered or sum paid into Court had been accepted; and the judge may

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The position here is that contemplated by r. 19, sub-r. 8.

[He was stopped.]

G. J. Paull for the respondent. There are two ways in which a respondent in arbitration proceedings may submit to an award with or without denying liability—namely: (1.) If the award is for future payments he may file a submission thereto; or (2.) if the award is for past payments he must specify the total amount of the liability he acknowledges and pay that sum into Court. Here the sum has not been paid into Court.

In sub-r. 2 of r. 19 the words are "in accordance with this rule." This throws one back to sub-r. 1 (*a*) of r. 19. Sub-r. 1 (*a*) provides by para. (i.) for a submission to an award for a weekly sum. This means for a payment week by week and must refer to future payments. Sub-r. 1 (*a*) (ii.) of r. 19 provides for a submission for the payment of a lump sum sufficient to cover liability and in this case the money must be paid into Court. This must refer to a liability that is past. If para. (i.) covers past as well as future liability, para. (ii.) is unnecessary and, being more onerous, would be useless.

[LORD STERNDALE M.R. Would it not follow that in cases where a submission was filed partly for past and partly for future liability the respondent would have to use two forms and pay as to the past into Court?]

Not necessarily. Para. (ii.) is for use when the respondent is willing to close the whole matter by offering a sum which he says is sufficient. The words are "which he considers sufficient to cover his liability."

There is no such thing as an award for a weekly payment for past liability. The award is for a lump sum arrived at by adding the payments due together: see Workmen's Compensation Rules, Form 24, para. 2.

[He also referred to Form 15.]

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order any costs incurred by such respondent after notice of submission to an award or payment into Court to be paid by any party who has not given notice of acceptance of such weekly payment or sum, and may order such costs to be set off against any costs payable to such party, or to be deducted from any weekly payment or compensation awarded to such party. . . . ."

In r. 19, sub-r. 8, the words "if no greater weekly payment or compensation is awarded than that which the respondent has submitted to pay or has paid into Court . . . ." must be read as "no greater weekly payments than that which the respondent has submitted to pay or no greater compensation than that which the respondent has paid into Court." Compensation here is the lump sum awarded by the judge as in Form 24, para. 2. It follows that this sum must be paid into Court.

It is the policy of the Courts to make a defendant, who offers a sum in settlement with a denial of liability, pay that sum into Court, otherwise it is no defence. The rules were drawn up with this in view, and r. 19, sub-r. 1 (*a*) (i.), was only meant to apply when it is impossible for the respondent to pay in the sum as the liability is unascertained. Rule 19, sub-r. 1 (*a*) (ii.), is intended to meet the case, where, as here, the liability is ascertained.

LORD STERNDALE M.R. I think this appeal must be allowed. It raises a curious point. The workman filed a request for arbitration in which he claimed 1*l.* per week from April 21, 1922, together with a declaration of liability. In their answer the respondents stated that whilst denying that they were liable for any payment of compensation subsequent to April 21, 1922, they were ready and willing to submit to an award for the payment of 1*l.* per week from that date up to June 21, 1922. This submission was filed on June 22, 1922. The payments therefore to which they were submitting were all past payments. Did that submission under r. 19 require that they should pay the money into Court?

Rule 19, sub-r. 1, of the Workmen's Compensation Rules, 1913–1917, provides: "A respondent who admits liability may at any time before the day fixed for proceeding with the arbitration, (*a*) Where the application is made by an injured workman, (i.) file with the registrar a notice that he submits to an award for the payment of a weekly sum, to be specified in such notice; or (ii.) file with the registrar a notice that he

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submits to an award for the payment of a lump sum, to be specified in the notice, which he considers to be sufficient to cover his liability in the circumstances of the case, and pay such sum into Court." Sub-r. 2 provides: "A respondent who denies liability may at any time before the day fixed for proceeding with the arbitration file a notice of submission to an award or pay money into Court in accordance with this Rule."

The learned judge made an award that the appellants should pay to the respondent the sum which they submitted to pay—namely, 1*l.* per week up to June 21, with costs, and ordered them to pay the costs of the arbitration. The appellants appeal as to costs on the ground that having submitted to an award and no greater sum having been awarded than that which they had submitted to pay they ought not, under sub-r. 8 of r. 19, to have to pay the costs of the arbitration proceedings after the date of the filing of their submission. In answer to that it is contended that the appellants were not entitled to the benefit of that sub-rule, because having submitted to the award in respect of past payments they ought to have paid the money into Court, that sub-r. 1 (*a*) (i.) must be confined to future payments and that sub-r. 1 (*a*) (ii.) refers to past payments and that under it the money must be paid into Court. In my judgment neither of the sub-rules says anything of the kind, and that being so, it leaves the case of a submission in respect of both past and future payments unprovided for. It seems to me that if the argument for the respondent is correct there must in a case like the present be both a payment into Court and a submission. But r. 19 provides nothing of the kind. I think sub-r. 2 gives the respondent an option to submit to the payment of a lump sum instead of a weekly payment in respect of either past or future liabilities. Whether there was power to make such a rule I doubt. The rule enables the party liable to say: "I do not want to submit to a weekly payment; I want to get rid of both past and future liability." I think the respondent in a case like the present has the alternative given him either to submit

to payment under sub-r. 1 or to pay into Court under sub-r. 2, and in either case he is entitled to the benefit of sub-r. 8 of r. 19.

The appeal must be allowed and so much of the award set aside as orders the appellants to pay the respondent's costs after the date of the filing of the submission.

WARRINGTON L.J. I am of the same opinion. The judge in the present case has awarded the workman a sum of money in respect of weekly payments from April 21 to June 21, 1922. The employers had filed a submission to an award for that amount and for that period. The workman therefore obtained an award for no greater sum than that which the employers had submitted to pay. In those circumstances therefore, under sub-r. 8 of r. 19, the workman is not entitled to recover any further costs than the costs up to the date of the filing of the submission; but notwithstanding that rule the judge has ordered the employers to pay the whole of the costs of the arbitration. In my opinion that is wrong. It is contended that inasmuch as the period of time covered by the award had expired before the application was made the money ought to have been paid into Court. There is nothing in the rules to support that contention. Payment into Court is regulated by r. 19, sub-r. 2, which provides: "A respondent who denies liability may at any time before the day fixed for proceeding with the arbitration file a notice of submission to an award or pay money into Court in accordance with this rule." That throws one back to sub-r. 1 of r. 19. [His Lordship read sub-r. 1 (*a*) and continued:] This gives the alternative of submitting either to an award of a weekly payment or to an award of a lump sum sufficient to satisfy the liability. With regard to the payment into Court the framers of the rules appear to have had in mind the payment of a lump sum in satisfaction of all claims past or future and not merely of past weekly payments. The employer is entitled, if he pleases, to adopt the first of the two alternatives and submit to an award for a weekly payment: r. 19, sub-r. 4. It makes no difference either

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that so many weeks have elapsed before the date of the submission or that the whole period has elapsed before that date. The lump sum that the workman may accept under sub-r. 4 covers the whole of the liability. I think the judge was wrong and the award must be set aside so far as it gives costs to the respondent after the date of the filing of the submission.

YOUNGER L.J. I do not differ, but I confess that the point does not appear to me to be so clear as it does to my Lord and the Lord Justice. Left to myself I should have arrived at a different conclusion. The offer of the appellants was intended to be an offer to submit to an award which, when made, would put an end to their liability in this matter. On June 22 they expressed their readiness to submit to an award for a sum of money to be paid by them equal to weekly payments running from April 21 to June 21 and amounting to 8*l.* 13*s.* 4*d.* It is admitted, and I do not think it could be disputed, that if instead of making the submission in that form they had in terms submitted to an award for payment of a lump sum of 8*l.* 13*s.* 4*d.* that submission would not have been effective to put the appellants in the privileged position as to costs under r. 19, sub-r. 8, unless the submission had been accompanied by a payment into Court of that sum. My difficulty in the present case is to see any sufficient reason why the appellants should escape liability for costs when without paying anything into Court they have in effect submitted to an award for a fixed sum none the less that they have described it as being a weekly payment up to a date then past. I agree that the words of the rule are not too clear, but the forms attached to the rules and the very able argument of Mr. Paull with reference to them would but for the opinions of my colleagues have led me to the conclusion that, although a submission to pay a weekly sum extending over a period both past and future need not even in respect of the past be accompanied by any payment into Court, yet an offer to pay a weekly sum confined to a past period only and intended to be in satisfaction of a respondent's liability is not, however

expressed, effective to secure for him the benefit of r. 19, sub-r. 8, unless it is accompanied by payment into Court of the ascertained amount.

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Appeal allowed.

Solicitors for appellants: *Barlow, Barlow & Lyde.*
Solicitors for respondent: *Lewis Barnes, Drake & Nicholson.*

W. I. C.

LA FABRIQUE DE PRODUITS CHIMIQUES SOCIÉTÉ ANONYME *v.* LARGE.

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[1921. F. 2631.]

Insurance (Marine)—Loss, total or partial—Goods of different Species—Packages separately valued—Insurance for Lump Sum—F.p.a. Clause—Total Loss of Part of Goods—Extent of Risk—Warehouse Clause—Insurance against "thieves"—Theft with Violence—Breaking into Warehouse locked but unattended—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 76, *sub-s.* 1; *First Sch., r.* 9.

By a Lloyd's policy of marine insurance three distinct parcels of perishable goods—namely, two parcels of vanillin and one parcel of caffeine—all separately valued, were insured against certain perils in a lump sum made up of the separate values of the parcels, the policy containing a clause by which it was warranted free from particular average. The two parcels of vanillin were lost by one of the perils insured against:—

Held, that the contract of insurance was apportionable as between the several parcels of goods, that the loss was a total loss of a severable part of the goods insured and not a particular average loss of the whole, and, consequently, that the insurers were not exempted from liability by the said clause.

Even on the assumption that in a warehouse to warehouse policy, as in an ordinary marine policy, the expression "thieves" as denoting an insured peril is limited to persons who steal by violence, that expression is properly applicable to persons who steal goods by breaking into a warehouse, though they find the warehouse unattended and commit no assault upon any individual.

Quaere, whether in a warehouse to warehouse policy as in an ordinary marine policy the expression "thieves" as used of an insured peril is limited to persons who steal with violence and does not also include persons who steal clandestinely.

ACTION in the commercial list tried by Bailhache J.

Messrs. A. Johnson & Co. (London), Ld., sold c.i.f. to the

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plaintiffs, La Fabrique de Produits Chimiques Société Anonyme, a Swiss company, three cases of chemicals being perishable goods—namely, two cases of vanillin, and one case of caffeine.

By a Lloyd's policy of marine insurance dated November 21, 1918, the defendant, F. N. Large, and other underwriters insured for the plaintiffs lost or not lost at and from London to Bordeaux while there and thence to Brougg, Switzerland, in consideration of the premiums therein mentioned, the said three cases of chemicals which it was expressed "are and shall be valued at 1100*l.*: On 1 case containing vanillin valued 462*l.*, on 1 case containing vanillin 363*l.*, on 1 case containing caffeine 275*l.*," against adventures and perils (inter alia) "of . . . . thieves . . . . and of all other perils losses and misfortunes that have or shall come to the hurt detriment or damage of the said goods and merchandises . . . . or any part thereof. . . . ." The policy included several of the Institute Cargo Clauses, and (inter alia) the warehouse to warehouse clause, which was as follows: "5. Including (subject to the terms of the policy) all risks covered by this policy from shippers' or manufacturers' warehouse until on board the vessel, during transhipment if any, and from the vessel whilst on quays wharfs or in sheds during the ordinary course of transit until safely deposited in consignees' or other warehouse at destination named in policy"; and the f.p.a. clause, which was as follows: "8. Warranted free from particular average unless the vessel or craft be stranded sunk or burnt, but the owners are to pay the insured value of any package or packages which may be totally lost in loading, transhipment or discharge, also any loss of or damage to the interest insured which may reasonably be attributed to . . . . landing, warehousing, forwarding, and special charges if incurred."

In accordance with the plaintiffs' instructions the packages pending shipment were delivered to the L.E.P. Transport and Depository, Ld., and were put into the latter company's warehouse, which during the night was strongly locked up, but not attended by any watchman.

On December 23, 1921, the plaintiffs brought the present action against the defendant for a loss under the policy. The plaintiffs alleged in their points of claim that the two cases of vanillin were stolen from the said warehouse on November 29, 1918; that they thereupon became entitled to recover 825*l.*, being the insured value of these two cases; and that the defendant's proportion of the sum underwritten was 51*l.* 11*s.* 3*d.* The defendant in his points of defence stated (inter alia) (para. 3) that the loss, if any, was not by any peril insured against; (para. 4) that in the alternative the insurance was warranted free from particular average save in certain circumstances set out in the policy; and that the said two cases of vanillin were not lost in any such circumstances, but constituted a particular average loss under the policy for which the defendant was in the premises under no liability.

Evidence was called on behalf of the plaintiffs which went to show that on November 29, 1918, during the night the warehouse was forcibly entered and the two cases of vanillin were stolen; that the intruders entered through a door which was firmly fastened by a mortice lock and large padlock, using crowbars to break away the padlock and to remove the beading round the door so as to enable them to destroy the mortice lock; and that they then forced their way through two large gates which were secured by bar and padlock, using crowbars for that purpose also.

MacKinnon K.C. and *H. U. Willink* for the plaintiffs. The plaintiffs are entitled to recover. First, the two cases of vanillin were lost by peril of "thieves" within the meaning of the policy. It is true that in a policy of marine insurance strictly so called that expression does not extend to persons who steal clandestinely and without violence: see Marine Insurance Act, 1906, Sch. I., r. 9. In this case, however, the policy is not a mere policy of marine insurance, but includes the warehouse to warehouse clause of the Institute Cargo Clauses, and the loss took place not on the ship, but in a warehouse. Further, the persons who stole the goods

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took them with violence. Secondly, the loss was not a loss for which the defendants are exempted from liability by the "free from particular average" clause in the policy. Generally, under a policy containing that clause, the assured cannot recover for a particular average loss of part of the insured goods: *Ralli* v. *Janson.* (1) There is, however, an exception where the contract is apportionable, as where the goods insured are of distinct kinds or are separately valued, in which case the assured may recover for a total loss of any apportionable part: *Duff* v. *Mackenzie* (2); *Hills* v. *London Assurance Corporation* (3); *Wilkinson* v. *Hyde* (4); and see Marine Insurance Act, 1906, s. 76, sub-s. 1, and in the present case the loss is within that exception, because the vanillin which was stolen was both different in kind from the caffeine, and also separately valued.

Leck K.C. and *James Dickinson* for the defendants. The plaintiffs cannot recover. First, the vanillin was not lost by peril of "thieves" within the meaning of the policy. In an ordinary policy of marine insurance peril of "thieves" means only peril arising from persons who steal from the ship with violence. In a marine policy which includes a warehouse to warehouse clause the expression must be similarly understood, and must be limited to persons who steal, whether from ship or warehouse, by violence. At any rate the expression must be so construed in this marine policy, in which the warehouse to warehouse clause is that of the Institute Cargo Clauses: "Including . . . . all risks covered by this policy" from warehouse to warehouse. For this purpose violence means an assault upon or resistance to some individual, and as the warehouse in question was unattended at the time when the goods were stolen, the persons who stole them did not steal them with violence. Secondly, the loss was a particular average loss, for which the defendants are protected from liability by the "free from particular average" clause. The contract of insurance contained in the policy was an entire and not an apportionable contract. All the goods insured

(1) (1856) 6 E. & B. 422.
(2) (1857) 3 C. B. (N. S.) 16.
(3) (1839) 5 M. & W. 569.
(4) (1857) 3 C. B. (N. S.) 30.

were substantially of the same class—namely, chemicals—and they were valued in one lump sum of 1100*l*. It was merely for the purpose of the f.p.a. clause that the goods were put up in separate cases and separately valued. In these circumstances the loss of the vanillin was a particular average loss of a part of the whole subject matter, and not a total loss of a separate subject matter: see Marine Insurance Act, 1906, s. 76, sub-s. 1, and the authorities already cited on this point.

BAILHACHE J. By a policy of marine insurance the defendant insured for the plaintiffs from London to Brougg in Switzerland three cases of perishable goods—namely, two cases of vanillin and one case of caffeine—the policy covering risks from warehouse to warehouse, and being free of particular average. The two cases of vanillin were stolen from a transporting warehouse in London. The action is brought by the plaintiffs upon the policy to recover the loss. The defences to the claim are that the loss was only a particular average loss and that as particular average is excluded from the policy the defendant is not liable; and further that even assuming that the loss was not a particular average loss but a total loss of part of the goods which can be severed from the rest, it was not a loss by "thieves" within the meaning given to that term in a policy of marine insurance.

I will deal first with the latter of these two points. [His Lordship stated the facts relating to the loss of the goods from the warehouse and continued:] It is contended on behalf of the defendants that the goods in question were not lost through being taken by "thieves" within the meaning of the policy. It is true that in a policy of marine insurance pure and simple the risk of loss by thieves does not cover an ordinary clandestine theft, but only theft accompanied with violence. Counsel for the defendants, however, says that the same rule must be applied in the case of a policy which is a warehouse to warehouse policy as well as a marine policy. He says that the rule must at all events be applied here, because in this policy the warehouse to warehouse clause

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is clause 5 of the Institute Cargo Clauses, which provides that the risks covered are "all risks covered by this policy," meaning that the risk of thieves under a policy which includes that warehouse to warehouse clause must have the same construction as in an ordinary marine policy, and must be taken to apply only to the risk of theft with violence. Then he says that as the goods were taken from the warehouse during the nighttime when it was left unattended the persons who took them did not take them with violence, and therefore were not thieves within the meaning of the policy. I am not sure that in a warehouse to warehouse policy as in a purely marine policy the word "theft" ought to be limited to theft by violence. In my opinion, however, even if in a policy of that kind the word ought to be so limited, the theft which was committed in this case was clearly a theft by violence. Those who took the goods smashed in two sets of doors with crowbars in order to get at them, and in these circumstances it seems to me that they undoubtedly committed theft by violence. I do not think that the expression "by violence" as used in this connection means that an assault must be committed upon some person. It seems to me therefore that even if counsel for the defendant is right in saying that theft from a warehouse must be of the same character as theft from a ship, that is to say a violent and not a clandestine theft, the facts of this case answer to the description of a theft by violence.

It is next contended on behalf of the defendant that as the policy under which all these goods were insured was warranted free of particular average, and as only a portion of these goods was stolen, there has not been a total loss of the whole or any severable part of the goods, and therefore that there can be no claim under the policy. The law by which it is determined whether or not a loss is a particular average loss seems to me to be clear both on authority and under the Marine Insurance Act, 1906. Where perishable goods are insured for a lump sum and in bulk which is all of the same description, then the total loss of part of the bulk is a particular average loss and gives no claim under a policy which is free

of particular average. To this rule, however, there are exceptions in three instances. First, it very often happens that there are express words in the policy which make each package a separate insurance, and in that case the loss of one package is a total loss of that particular package, and even although the policy contains a f.p.a. clause the underwriters are liable for the loss of that particular package. Secondly, there is sometimes an insurance in one lump sum of goods of actually distinct kinds. The instance was given in which the master of a ship insured for one sum all his effects, including things of such different kinds as a feather bed and a chronometer, and it was held that the effects were so distinguishable in kind that the loss of one particular article was a total loss of that article and not a particular average loss of the whole, and that the assured was entitled to recover: see *Duff* v. *Mackenzie.* (1) Another instance given was that in which an emigrant going to Natal effected one general insurance of the whole of his equipment, including a wagon, a tent, and many other things equally diverse, in separate packages, and it was held that the packages were so distinct in character that the loss of one package was a total loss of that package and not a particular average loss of the whole, and that the assured could recover: see *Wilkinson* v. *Hyde.* (2) Thirdly, even where the goods insured are all of the same species, yet if they are contained in cases or packages which are themselves separately valued, the loss of one of those packages is a total loss of that package and not a particular average loss of the whole. In the present case not only were the goods insured of different species, the two cases lost containing vanillin and the case left being one of caffeine, but, further, each case had a separate value attributed to it, one case being valued at 462*l.*, one at 363*l.*, and one at 275*l.* It is true that the insurance is for a whole sum of 1100*l.*, but that whole sum is merely the addition of the separate values of the three cases. It seems to me to be clear that here the goods insured were of different species, and also that they were separately valued, and therefore that there is a double reason for holding that the loss

(1) 3 C. B. (N. S.) 16. (2) 3 C. B. (N. S.) 30.

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of the two packages of vanillin was not a particular average loss of the whole of the goods insured, but was a total loss of these particular goods.

In these circumstances, in my opinion, judgment must be for the plaintiffs for the amount claimed—namely, 51*l.* 11*s.* 3*d.* with interest from the date of the writ and costs.

Judgment for plaintiffs.

Solicitor for the plaintiffs: *L. Goldberg.*

Solicitors for the defendant: *Thomas Cooper & Co.*

J. R.

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In re UNEMPLOYMENT INSURANCE ACT, 1920.

In re NEWTON-KING (*de* WEBBER).

Insurance (Unemployment)—Employed Person—Excepted Employments—Domestic Service—Casual Employment—Golf Caddie—Unemployment Insurance Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 30), *s.* 1, *Sch. I., Part II.* (*b*) (*i*).

W., a golf caddie, was employed by a golf club through their caddie master. The method of W.'s employment was as follows: He asked the caddie master to put him on the caddie list. When subsequently he presented himself he might or might not carry clubs, but he could absent himself when he liked, and his employment was of a casual nature. The charges per round were fixed by the club; he was under the control of the caddie master and paid by the club through him:—

Held, that W. was not employed in domestic service within Sch. I., Part II. (*b*), of the Unemployment Insurance Act, 1920, and also, that although employed in casual labour his employment was for the purposes of a game where he was employed by a club within the latter part of sub-s. (*i*) of Part II. of the above Schedule, and that consequently he was insurable.

TRIAL of an issue referred to the Court by the Minister of Labour for decision under s. 10, sub-s. 1 (ii.), of the Unemployment Insurance Act, 1920.

T. J. F. Webber was a golf caddie at the Royal North Devon Golf Club. The method of his engagement and employment, and that of the other caddies of the club, was as follows, as stated by the secretary, Major Newton-King.

Webber had asked the caddie-master of the club to put him on the caddie list, and his request was granted. When, subsequently, he presented himself, he might or might not carry clubs, and he could stop away if he wished to, his labour being purely casual. No voucher or badge was issued to him by the club. The charges were fixed by the club at so much per round. Webber was under the control and orders of the caddie master and was engaged and paid by the club through the latter. He had no regular engagement with the club, but only went there on the off-chance of getting a job. The only exception was when a member engaged a caddie by the week. Webber's duties were to carry the members' clubs, to tee the ball if asked to do so, and to watch it carefully, to go to the flag if told by the member employing him to do so, and to clean the clubs after use.

The question for the Court was whether Webber was insurable under the above Act. The matter had been before Roche J. on a previous occasion, but had been adjourned in order to enable the golf club to be represented.

Ellis Hill for the Royal North Devon Golf Club. Webber is not insurable by reason of Sch. I., Part II. (*b*), of the Act (1), in that he is employed in domestic service. He is a club servant within the decision in the *Junior Carlton Club Case.* (2) His position is analogous to that of a gamekeeper, or more nearly still to that of a club billiard-marker. Like the latter, and in the words of Roche J. in the above case (3), his "main or general function . . . . is to be about [his] employers' persons, or establishments . . . . for the purpose of ministering to [his] employers' needs or wants, or to the needs or wants of those who are members of such establishments." The only difference is that a caddie is less regular

(1) Unemployment Insurance Act, 1920 (10 & 11 Geo. 5, c. 30), Sch. I., Part II.: "Excepted employments . . . . (*b*) Employment in domestic service . . . . (*i*) Employment of a casual nature otherwise than . . . . for the purposes of any game or recreation where the persons employed are engaged or paid through a club, and in such case the club shall be deemed to be the employer."

(2) [1922] 1 K. B. 166.

(3) Ibid. 170.

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in attendance. If Webber is not employed by the club he is not insurable, because he is in no other employment.

It is not contended that because his employment is of a casual nature he is not insurable by reason of the provisions of Sch. I., Part II. (*i*) (1), for he seems to be within the exception from that exception contained in the latter part of the sub-section.

Hynes for the Golf Clubs Protection Association as amicus curiæ. He is exempt under Sch. I., Part II. (*i*) (1), and is not within the exception therein, because he is not really in the employment of the club; he is a person who, though chosen by the caddie master, is controlled by the player.

C. W. Lilley for the Minister of Labour. Webber is insurable under Sch. I., Part II. (*i*) (1), because although in casual employment he comes within the exception from the exception contained therein. If that is correct it would not be right to say that although taken out of one exception in the schedule he can be brought into another, that of employment in domestic service under Sch. I., Part II. (*b*). (1) It is not therefore necessary to argue this latter point.

[ROCHE J. A person may be within two exceptions, and the fact that a proviso takes him out of one does not prevent him from being within the other.]

Webber is not a domestic servant. There is not the personal relation, the nexus, between him and the club which exists in domestic service. He is merely allowed by the club on the links to get an engagement by a member if he can.

Ellis Hill replied.

ROCHE J. This matter arises by way of reference to me by the Minister of Labour of a question under the Unemployment Insurance Act, 1920. The question is a very limited one—namely, whether one Webber, a golf caddie employed on the links of the Royal North Devon Golf Club, is an insurable person under the Act. The matter came before me on a former occasion, and I then intimated that in my opinion it was desirable that the golf club should be represented so that

(1) Ante p. 211, note (1).

I might have the materials before me upon which to decide the question. Hence I have had the advantage of hearing the very brilliant argument of Mr. Ellis Hill, and of the assistance as amicus curiæ of Mr. Hynes, and of Mr. Lilley. As a result of the argument I am satisfied that in this particular case this particular caddie is an insurable person. I am also satisfied that my decision is of a most limited scope and effect, and that on a great number of other golf courses a caddie might not be insurable. Whether a caddie is insurable or not depends, for reasons which will appear later, upon the particular method of his employment, engagement, and control at the particular course, and on the present facts I think that this particular employment is brought within the very special words of Sch. I., Part II. (*i*), of the Act. (1) Mr. Ellis Hill, for the club, felt himself unable to contend that if Webber is not a domestic servant he is not insurable by reason of the above provision, for the conditions therein which make him insurable, although his work is of a casual nature, seem clearly fulfilled. He rested the whole stress of his argument on an effort to bring the caddie within Sch. I., Part II. (*b*) (1), as being in employment in domestic service. The question, therefore, I have to consider is whether Webber is in domestic service. In my opinion he is not. In the *Junior Carlton Club Case* (2) I gave a description of domestic servants which was not intended to be an exhaustive definition but a description only. I there described them (3) as "servants, whose main or general function it is to be about their employers' persons, or establishments . . . . for the purpose of ministering to their employers' needs or wants, or to the needs or wants of those who are members of such establishments." In my opinion the nature of this employment is so casual, the nexus of service so slight, and the relation so different from that ordinarily understood as that existing between a domestic servant and his employer, that I am unable to bring this employment within the category of employment in domestic service. The relation of a caddie to

(1) Ante, p. 211, note (1). (2) [1922] 1 K. B. 166.
(3) Ibid. 170.

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the player or of the caddie to the club, is not analogous to that of a billiard-marker in a club. The billiard-marker is of necessity much more regular in his employment, and his other characteristics are such as to make him properly describable as a club servant, and, I think, as a club domestic servant. The other suggested analogy is that of a game-keeper. The same differences suggest themselves as those in the case of the billiard-marker. I think a truer analogy would rather be that of a beater engaged in driving game than that of the keeper who regularly and mainly attends about his employer's person or estate. For these reasons I hold that Webber is not employed in domestic service, and is insurable.

I also decide that although in my view golf caddies are not in any ordinary sense the employees of a club, yet, on the particular facts of this case Webber is to be deemed to be employed by the club by reason of the specific words of Sch. I., Part II. (*i*). (1) This decision, I think, is of no very general application, for I gather that there is a large number of other systems of the employment of caddies which do not involve their engagement or payment through a club. To those cases my decision has no application whatever.

Judgment accordingly.

Solicitors for applicant: *Watson, Sons & Room.*
Solicitor for respondent: *Solicitor to Ministry of Labour.*

(1) Ante, p. 211, note (1).

W. L. L. B.

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In re FOX (*de* MILLS).

In re GORDON (*de* HOWARD).

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Insurance (Unemployment)—Employed Persons—Domestic Service—Domestic Servant in Nursing Home kept by Doctor—Chauffeur driving Doctor on Rounds visiting Patients—"Employment . . . . in any trade or business"—Unemployment Insurance Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 30), *s.* 1, *Sch. I., Part II.* (*b*).

A domestic servant was employed in a nursing home kept by a doctor:—

Held, that she was employed "in . . . . [a] business carried on for the purposes of gain" within s. 1 and Sch. I., Part II. (*b*), to the Unemployment Insurance Act, 1920, and was therefore insurable.

Held, also, that a chauffeur, employed primarily by a doctor in general practice to drive him on his rounds visiting patients, was similarly employed, and was insurable.

TRIAL of issues referred to the Court by the Minister of Labour for decision under s. 10, sub-s. 1 (ii.), of the Unemployment Insurance Act, 1920 (10 & 11 Geo. 5, c. 30).

In the first issue one Annie Mills, a maid waitress, was employed by Dr. Edward Fox in a nursing home conducted by him at 12 Rylands Street, Warrington. At the home were also situated the employer's consulting room and surgery, his private residence being elsewhere. In the home were four bedrooms, one occupied by three nurses who formed the nursing staff, and the remaining three by patients. Mills was one of a staff of four maids. She was a whole-time employee residing on the premises, the other three being only employed daily. Her duties were to clean the surgery, consulting room and waiting room, to open the door to non-resident patients, and to carry out ordinary domestic duties for the above-mentioned nurses. (1)

The question was whether the employment of Mills was one in which she ought to be insured under the provisions

(1) In the course of the argument it was agreed that the judge should treat Mills as being a nursing home maid. It was to be ascertained afterwards whether she or one of the other maids actually filled that position, and the name altered if necessary.

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of s. 1 and Sch. I., Part I., of the Act, or whether she was exempt as being in an employment exempted under the provisions of s. 1 and Sch. I., Part II. (*b*), which exempts "Employment in domestic service, except where the employed person is employed in any trade or business carried on for the purposes of gain."

In the second issue, Robert Howard was a chauffeur employed by Dr. William Gordon, a physician practising at 3 Barnfield Crescent, Exeter, and primarily employed for the purpose of driving his employer on his professional rounds. The question raised was the same as in the preceding issue.

The two cases had been adjourned in order that the medical profession might be legally represented.

Carthew for the Medical Defence Union and the London and Counties Medical Protection Society. Annie Mills is a domestic servant, and she is not "employed in . . . . [a] business carried on for the purposes of gain" within the meaning of Sch. I., Part II. (*b*), to the Unemployment Insurance Act, 1920, and is therefore not insurable. The housing of the patients is only incidental to the doctor's practice, and is not the part to which he looks for his main remuneration, patients only being sent to the home because there are not facilities in some houses for nursing sick persons.

[ROCHE J. I have already decided that a servant in a nursing home is insurable. (1)]

With regard to the chauffeur, there are two questions involved—first, whether he is engaged in the doctor's business, if it be one, and, secondly, whether that is a business. The employment of a chauffeur is a luxury, and is not necessary to the carrying out of a doctor's duties. In very many instances doctors drive themselves. The chauffeur is merely the doctor's personal attendant. In *In re Wilkinson* (2) Roche J. instanced "a chauffeur who drives a member of

(1) *In re Clark* (*de Tame*). Unreported. January 13, 1922.
(2) [1922] 1 K. B. 584, 589.

the bar or a solicitor daily to his place of business, but it would be unduly straining language to hold that the chauffeur was employed in the business."

The profession of a doctor is not a "business carried on for the purposes of gain."

The argument of Sir Ryland Adkins in the *Rugby School Case* (1) with regard to the profession of a schoolmaster is applicable here. Part II. (*b*) of Sch. I. is confined to employment in a trade or business; "profession" is not mentioned, as it might have been, and the sub-section should therefore be construed strictly. In the medical profession services are frequently rendered voluntarily, from the high standard of duty and professional conduct maintained by that profession, and any occupation where such a state of things exists on a large scale, cannot be classed with businesses carried on for the purposes of gain. "Profession" connotes a higher standard of public duty than does "business."

C. W. Lilley for the Minister of Labour. In the first case Mills was employed in the business of a nursing home. Roche J. has already held in *In re Clark* (*de Tame*) (2) that the conduct of a nursing home is a business and that a domestic servant therein was employed in the business and insurable. It makes no difference that it is carried on by a doctor.

With regard to the chauffeur, Howard. He is as much one of the doctor's business staff—assuming it to be a business—as is a solicitor's messenger clerk, although he has no skill in the profession itself. A motor car is essential to a doctor where his patients are scattered over a wide area, and its cost is an allowed deduction for the purposes of income tax. The chauffeur is not a mere luxury, for at least he looks after the car while the doctor visits the patients.

A doctor carries on a business. He can sell the goodwill, can have a partner and partnership accounts can be taken. His position is more analogous to that of a solicitor than to that of a schoolmaster.

Carthew replied.

(1) [1922] 1 K. B. 172, 178–9. (2) Unreported. January 13, 1922.

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ROCHE J. These are two cases arising for my decision under the Unemployment Insurance Act, 1920, by reason of the reference to me of the questions involved by the Minister of Labour. The cases were before me on a former occasion and were adjourned in order that all the persons concerned might be represented before me. The result is that I have had a most informative argument addressed to me and have ascertained some most relevant facts which otherwise would not have come to my knowledge.

In the first case it appears that Dr. Fox, besides practising as a physician, conducts a nursing home on part of premises where he has his surgery and consulting room. The question is whether a domestic servant named Annie Mills is or is not insurable. I decide that she is, and for the following reasons. I held in *In re Clark* (*de Tame*) (1) that the conduct of a nursing home is the carrying on of a business for the purposes of gain, and that a domestic servant employed therein is employed in the business. I further decide here that it makes no difference that it is a doctor who conducts the home, and his position as regards the duty to insure the servants employed in that business is the same as the law imposes on others conducting such a home.

That, I think, is sufficient to dispose of the case. But during the argument I observed that these premises at Warrington serve a dual purpose; that of a surgery and consulting room, and that of a nursing home. I adhere to the view I have expressed in other cases, that such domestic servants as merely prepare the surgery or consulting room for the purpose of the doctor's occupation are not employed in the business of the doctor, and that such persons fall within my decision in *In re Wilkinson* (2), a case of a charwoman employed in a solicitor's office. But Annie Mills is not of that class and I therefore hold that she is insurable.

I now pass to the other case. Dr. Gordon employs Robert Howard as a chauffeur, and employs him primarily to drive him for professional purposes. It follows that I am not giving a decision in regard to cases where a chauffeur is

(1) Unreported. January 13, 1922. (2) [1922] 1 K. B. 584.

employed by a doctor primarily for his private purposes and who incidentally makes journeys in connection with the doctor's professional work. That case does not arise here. The points which arise are three in number. First, is Howard a domestic servant? Mr. Lilley rightly admits that he is. Secondly, is he employed in the business of the doctor, if it be one? And, thirdly, is the practice by a doctor of his profession the carrying on of a business for the purposes of gain within the meaning of the Act? As I am of opinion, for reasons I will give later, that Howard is engaged in this occupation of his employer, it is necessary that I should decide the third question first—namely, whether the doctor is engaged in a business. In my opinion the carrying on by a doctor in general practice as is Dr. Fox is a pursuit upon lines sufficiently commercial to bring it within the term "business." I expressed a similar opinion with regard to the business of a solicitor without deciding it in *In re Wilkinson.* (1)

Let it not be supposed for a moment that I am overlooking the fact that the occupation of a doctor is the exercise of a profession and of a profession of the most dignified and elevated kind; but, nevertheless, in my judgment, as now organized and conducted there are those elements about the carrying on of the occupation which bring it within the term "business" for the purposes of this Act, on the language of which only, and on the present facts, I am deciding. It follows that I distinguish this case from the *Rugby School Case* (2), where I held that the exercise by a schoolmaster of his profession in the nurture and education of young people is not a business carried on for the purposes of gain.

I now pass to the second question, whether Howard is employed in this business. Mr. Carthew relied on *In re Wilkinson.* (3) That case seems to me totally different from the present case. It was the case of a part-time employee, a charwoman, who came in before the business hours of her employer, a solicitor, began, to prepare his offices and cleanse them for the day. I held that the charwoman was engaged

(1) [1922] 1 K. B. 584, 587. (2) [1922] 1 K. B. 172.
(3) [1922] 1 K. B. 584.

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Roche J.

about her own business and in her own business, and not in the solicitor's business, and that their occupations were too separate and dissevered to constitute the charwoman a person employed in the solicitor's business. The illustrations I then gave have been relied on by Mr. Carthew, I think wrongly. I instanced a chauffeur who drives a member of the bar or a solicitor daily to his place of business, and I said that such a person could not properly be said to be employed in the business of the person he drove. It would be impossible to say that the cost of getting to the place of business could be allowed by the taxing authorities as an expense of the business. But the case of the doctor in the present case is quite different. His occupation is to go about and visit his patients, and for that purpose, day in and day out, he is carried about in a motor car driven by Howard. Therefore, in my opinion, Howard, though not a doctor nor skilled in the doctor's art, is employed in the doctor's business just as much as the messenger employed by a firm of solicitors is employed in the solicitors' business.

It was further contended by Mr. Carthew that although the motor car is used by the doctor in his business, yet the use of a chauffeur is a matter of personal preference or even luxury, proper to the doctor personally and not connected with or essential to his business. Now it may be that doctors can and do dispense with chauffeurs and drive themselves, particularly in the country, but if a doctor chooses, for the greater efficiency of his business, either in the matter of dispatch, or for the greater safety of his car, for the ease of his own mind and the concentration of his intelligence upon his practice, to employ a chauffeur primarily for the purpose of driving him on his rounds and visiting his patients, I think the employment is so connected with, so involved in the prosecution of the business, as to result in the employee becoming employed in the business. I therefore hold that Howard is insurable.

Judgment accordingly.

Solicitors for applicants: *Hempsons.*

Solicitor for respondent: *Solicitor to Ministry of Labour.*

W. L. L. B.

[IN THE COURT OF APPEAL.]

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BARCLAYS BANK *v.* TOM.

Practice—Third Party Procedure—Right of Third Party to counterclaim against Defendant—Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 24, *sub-s.* 3.

A person who has been served by a defendant with a third party notice is entitled to counterclaim against the defendant.

APPEAL from Greer J. at chambers.

The action was brought by the plaintiff bank as holders for value of four bills of exchange drawn by Sir Bernard Oppenheimer and accepted by the defendant, Max Tom, which bills had been dishonoured. The defendant served upon the executrix of the drawer a third party notice claiming an indemnity on the ground that the bills in question had been accepted for the accommodation of the drawer. The third party in answer to the defendant's claim alleged that Sir Bernard Oppenheimer had had numerous commercial and other transactions with the defendant involving complicated cross-accounts between them which at the date of his death had not been settled, and that if an account were taken it would be found that the defendant was indebted to Sir Bernard Oppenheimer. She accordingly counterclaimed against the defendant for an account. The defendant applied at chambers to have the counterclaim struck out on the ground that a counterclaim by a third party was not permissible. The master refused the application, and his refusal was affirmed by Greer J.

The defendant appealed.

R. J. White for the appellant. Neither by the Judicature Acts nor by the Rules of Court is any authority given to a third party to counterclaim against a defendant. By s. 24, sub-s. 3, of the Judicature Act, 1873, which provides that "Every person served with any such notice"—a third party notice—"shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary

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way by such defendant," the rights which the third party is entitled to assert are limited to rights "in respect of his defence," which do not include a right to set up a cross-claim. This was the construction put upon that sub-section by Lush J. in *Street* v. *Gover*. (1) In *Eden* v. *Weardale Iron and Coal Co.* (2) it was held that a third party could not counterclaim against the plaintiff. Bowen L.J. there expressly left open the question whether a third party could counterclaim against the defendant. It is true that since that case there have been others in which such a counterclaim was allowed, but in none of them was the question of its admissibility raised. Of this *In re Salmon* (3) is an instance. In *Borough* v. *James* (4) where the third party counterclaimed against the defendant, Mathew J. ordered judgment to be entered for the plaintiff against the defendant, and the issue of the counterclaim to be tried separately. But the point that the counterclaim was inadmissible in the action was not there taken. But even if in a proper case a third party may be allowed to counterclaim, this is not such a case, for the counterclaim is not sufficiently "connected with the original subject of the cause or matter" within s. 24, sub-s. 3. It is for an account; it does not relate to the matter of the accommodation bills.

Wallington for the third party. The right of a third party to counterclaim against a defendant is well established in practice, not merely as a shield or defence pro tanto to the defendant's claim, but also as a weapon of attack. As Fry L.J. said in *In re Salmon* (5), "The scheme of the rules appears to me to be to make the proceeding against the third party an independent proceeding in which the defendant is to be the actor." In that view it is quite immaterial whether the counterclaim is connected with the defendant's claim or not. If the third party had been sued by the defendant in an independent action, his right to counterclaim would not have been limited to matters connected with the claim, and

(1) (1877) 2 K. B. D. 498.
(2) (1884) 28 Ch. D. 333.
(3) (1889) 42 Ch. D. 351.
(4) (1884) W. N. 32.
(5) 42 Ch. D. 363.

by s. 24, sub-s. 3, he is to have the "same rights in respect of his defence . . . . as if he had been duly sued in the ordinary way by such defendant." The issue of a third party notice is equivalent to the issue of a writ. The reason why the third party cannot counterclaim against the plaintiff is that the latter is not his plaintiff.

White in reply.

SCRUTTON L.J. This appeal raises a question of considerable importance, which arises in the following way. Barclays Bank bring an action against a gentleman of the name of Max Tom on certain bills of exchange. Mr. Tom says that in respect of those bills he was an accommodation acceptor and that the late Sir Bernard Oppenheimer as drawer was bound to indemnify him. Accordingly, the drawer being dead, he serves a third party notice on the drawer's executrix. The executrix says that when an account is taken between the defendant and her husband's estate it will be found that instead of her husband having been indebted to the defendant, he was indebted to her husband, and accordingly she counterclaims for an account. Thereupon the defendant applies to strike out the counterclaim on the ground (amongst others) that a third party cannot counterclaim at all. The master and judge declined to accede to that application, and from that refusal the defendant now appeals. This question whether a third party can counterclaim against the defendant requires careful consideration, because Bowen L.J., when deciding in *Eden* v. *Weardale Iron and Coal Co.* (1) that a third party could not counterclaim against the original plaintiff, said: "If the application had been for leave to the third party to counterclaim against the defendant, I should have desired to consider the question. It appears to me an open question whether the Court could have given leave." Now I think it is important to keep clearly in mind what the third party procedure is. A plaintiff has a claim against a defendant. The defendant thinks if he is liable he has a claim over against a third party. With that matter between

(1) 28 Ch. D. 333, 338.

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the defendant and the third party the plaintiff has obviously nothing to do. He is not concerned with the question whether the defendant has a remedy against somebody else. His remedy is against the defendant. But the defendant is much interested in getting the third party bound by the result of the trial between the plaintiff and himself, for otherwise he might be at a great disadvantage if, having fought the case against the plaintiff and lost, he had then to fight the case against the third party possibly on different materials, with the risk that a different result might be arrived at. The object of the third party procedure is then in the first place to get the third party bound by the decision between the plaintiff and the defendant. In the next place it is directed to getting the question between the defendant and the third party decided as soon as possible after the decision between the plaintiff and the defendant, so that the defendant may not be in the position of having to wait a considerable time before he establishes his right of indemnity against the third party while all the time the plaintiff is enforcing his judgment against the defendant. And thirdly, it is directed to saving the extra expense which would be involved by two independent actions. With these objects in view the third party order usually provides that the third party may appear at the trial between the plaintiff and the defendant. When the third party has so appeared as party to the proceedings, various questions arise as to what he can do. Can he counterclaim against the plaintiff? The answer is no, for such a counterclaim would have nothing to do with the issue in the action to which he is admitted as a party: *Eden* v. *Weardale Iron and Coal Co.* (1) Can he interrogate the plaintiff? The answer is yes, if the object of the interrogatories is to show that the plaintiff's claim against the defendant cannot be supported: *Eden* v. *Weardale Iron and Coal Co.* (2) I remember in one case in which I was counsel the third party was on the same principle allowed to raise a defence on behalf of the defendant which the defendant would not raise on his own behalf. When it has been ascertained that the defendant

(1) 28 Ch. D. 333, 338. (2) (1887) 35 Ch. D. 287.

is liable to the plaintiff the next step is to try, in such manner as the judge may direct, the question between the defendant and the third party. The defendant says, "You owe me so much by way of contribution or indemnity." How may the third party defend himself? Of course he may deny that he is under any such liability at all. But he may admit his liability and say that he has a cross-claim against the defendant which prevents any effective judgment being given against him. He may say, "Your right to contribution will result in 100*l.* being due from me to you, but I have a set-off in another matter in respect of which 100*l.* will be due from you to me." Or again he may, while admitting his liability to contribution, say that he has a claim against the defendant which cannot be made the subject of a set-off but will result in the defendant having to pay him so many pounds. It seems to me that the proper view to take on this part of the third party procedure is that taken by Cozens-Hardy L.J. in *McCheane* v. *Gyles* (1)—namely, that "The Act treats the third party procedure as analogous to a cause instituted by the defendant as plaintiff against the third party," with the consequence that the defendant may defend himself in any way in which any defendant in an action at the suit of a plaintiff may defend himself, among which modes of defence is included the making of a counterclaim. For these reasons it appears to me that Greer J. came to a right decision and that the appeal must be dismissed.

EVE J. I am of the same opinion. I respectfully agree with the view expressed in *McCheane* v. *Gyles* (1) that the Judicature Act, by which the third party procedure was created, treats that procedure "as analogous to a cause instituted by the defendant as plaintiff against the third party." It is clear that the service of the third party notice does not constitute the person on whom it is served a defendant to the action, but it seems to me that it does make him a defendant quoad the person serving the notice. And that seems to be the reasonable view to take, because the main

(1) [1902] 1 Ch. 287, 301.

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object of the procedure was to prevent the necessity for two actions. In the main action the rights of the plaintiff and the defendant are determined without reference to the defendant's claims over against the third party, but when those rights have been ascertained it is then open to the person brought in by the third party notice to have all relevant disputes determined between him and the person serving the notice. I think that a third party being in the position of a defendant in relation to the person who served the notice is entitled to counterclaim against him.

Appeal dismissed.

Solicitors for the appellants: *Syrett & Sons.*
Solicitors for the respondent: *A. & G. Tooth.*

J. F. C.

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[IN THE COURT OF APPEAL.]

WEISS, BIHELLER AND BROOKS, LIMITED *v.* FARMER (SURVEYOR OF TAXES).

Revenue—Income Tax—Exercising a Trade within the United Kingdom—Foreign Company—Chargeability of Agent—Contract—Whether Agency or Sale—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 41—*Income Tax Act,* 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2, *Sch. D.*

By s. 2, Sch. D, of the Income Tax Act, 1853, a duty is imposed "For and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom, and to be charged for every twenty shillings of the annual amount of such profits and gains."

By s. 41 of the Income Tax Act, 1842, ". . . . Any person not resident in Great Britain, whether a subject of Her Majesty or not, shall be chargeable in the name of . . . . any factor, agent, or receiver, having the receipt of any profits or gains arising as herein mentioned, and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in Great Britain, and in the actual receipt thereof."

The appellants were an English limited company carrying on business in London as manufacturers and sellers of incandescent and other mantles, and, under an agreement with a Dutch company called the Ramie Union,

were the sole sellers in the United Kingdom of the goods manufactured by the Ramie Union, which had its head office in Holland, where its books were kept and its general business transacted. The appellants' transactions with the Ramie Union formed only a small part of the appellants' business. Under the agreement the Ramie Union manufactured mantles and added to the cost 10 per cent. for expenses, and the appellants sold the mantles in England at the best possible price. The appellants were entitled to 5 per cent. commission for their expenses and the del credere, and the profits were divided. The appellants agreed to keep a separate day-book showing the selling prices, and this book was to be open to the directors of the Ramie Union. The name of the Ramie Union did not appear on the invoices sent by the appellants to their customers in England, but the appellants' premises had on them the name of the appellants as agents for the Ramie Union, though it was not proved that this had been authorized by the Ramie Union. An assessment to income tax was made on the appellants as agents for the Ramie Union in respect of profits derived by the Ramie Union from exercising the trade of vendors of gas mantles within the United Kingdom. The Commissioners confirmed the assessment, and their decision was affirmed by Sankey J. On appeal:—

Held, that there was evidence on which the General Commissioners could find that the Ramie Union was exercising a trade within the United Kingdom within the meaning of s. 2, Sch. D, of the Act of 1853, and on which they could find that the appellants were the agents of the Ramie Union within the meaning of s. 41 of the Act of 1842.

Decision of Sankey J. [1918] 2 K. B. 725 affirmed.

APPEAL from the decision of Sankey J. (1) upon a case stated by the General Commissioners for Income Tax.

The appellants appealed to the General Commissioners against assessments made under Sch. D of the Income Tax Acts upon the appellants as agents for the Ramie Union in respect of profits derived by the Ramie Union from carrying on the trade of vendors of gas mantles within the United Kingdom. The assessments were for the years ending April 5, 1913, 1914, 1915, and 1916.

The Ramie Union was a Dutch limited company whose business consisted in the manufacture and sale of incandescent gas mantles and had its head office at Enschede in Holland, where all its board meetings were held, its books kept, and banking and general business transacted. The Ramie Union held no shares in the appellant company, and no shares in the Ramie company were held either by the appellant company or by any of its shareholders.

(1) [1918] 2 K. B. 725.

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The appellant company was an English company incorporated under the Companies (Consolidation) Act, 1908, on July 1, 1913, to acquire a business of manufacturers and sellers of incandescent mantles and other mantles, till then carried on by Weiss & Biheller in London, and had its registered office at 70 and 71 Chiswell Street, London.

The appellants carried on a large business as glass importers and hardware merchants, and the transactions with the Ramie Union formed only a small part of the appellants' business.

In 1907 the appellants' predecessors began to buy from the Ramie Union gas mantles and other articles manufactured by the Ramie Union under an arrangement by which the appellants' predecessors agreed to buy up to a million mantles in return for an agreement by the Ramie Union to sell to no other person in the United Kingdom.

On July 13, 1909, the following agreement was made between the appellants' predecessors and the Ramie Union in order to regulate prices :—

" 1. The Ramie Union undertake to sell their manufactures to Weiss & Biheller, London, at a price so calculated that to the absolute cost and expenses percentage of 10 per cent. is added and no further profit is included in the price, and a detailed calculation of each article is to be put before Weiss & Biheller.

" 2. If in the course of manufacture it should show that articles are produced at a lower price than at first calculated, Weiss & Biheller are to be informed of this reduction at once and goods are to be charged on the basis of this new price.

" 3. If in the course of manufacture it should be shown that the manufacture of an article is dearer, then Weiss & Biheller are to be informed. The Ramie Union is obliged to execute orders for such articles as have already been accepted, whilst new articles must be transmitted at the new price.

" 4. Should it be in the interest of both parties that a lower percentage than the 10 per cent. should be calculated to get orders for certain articles, then by mutual agreement a lower percentage may be reckoned.

"5. If there should be a reduction in the price of thorium and other raw materials, the benefit of such reduction must come to Weiss & Biheller automatically, as the reduced cost affects the calculation.

"6. Weiss & Biheller sell the goods which they receive from the Ramie Union at the best possible prices, and will keep a separate day-book showing these selling prices, which is open to the authorized directors of the Ramie Union at any time.

"7. The profit which arises through selling the articles at higher prices than charged by the Ramie Union is to be divided in this way: Weiss & Biheller deduct 5 per cent. commission on the turnover for their general business expenses and the del credere; after deducting this commission the remaining difference between purchase prices from the Ramie Union and the sale prices by Weiss & Biheller will be equally divided between both parties and accounted for half-yearly.

"8. On the other hand Weiss & Biheller receive half the profit which the Ramie Union may make by selling to other customers (not English) at higher prices or by making a saving on the 10 per cent. manufacturing expenses. The profit of the Ramie Union will be ascertained after stock-taking and closing of books as heretofore.

"9. If there should be losses to the Ramie Union or to Weiss & Biheller, neither of the contracting parties bears part of such losses of the other party. The del credere will be borne altogether by Weiss & Biheller, and such losses must not be set off from the profit of Weiss & Biheller. Allowance for bad manufacture or mistakes owing to the fault of the Ramie Union is debited to them.

"This agreement is for one year from May 1, 1909, to May 1, 1910. The Ramie Union has to give at once new prices for the various kinds of mantles on the basis of the previously mentioned calculations."

It was agreed on January 17, 1911, that the manager of the Ramie Union should receive in addition to his salary

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10 per cent. out of the remaining difference referred to in para. 7 of the first agreement.

A further agreement was made on March 28, 1912, extending the previous agreements to March 28, 1917, the contracts to continue from year to year unless notice was given by either party six months before the expiration of any such annual period.

Weiss & Biheller and the appellant company to whom the agreements now applied had been in fact the sole sellers in the United Kingdom and the British Dominions of the goods manufactured by the Ramie Union.

The appellant company from time to time ordered from the Ramie Union a sufficient quantity of gas mantles to meet orders and as additions to stock. The Ramie Union invoiced the goods to the appellant company at the manufacturing cost plus 10 per cent. as agreed. The appellant company sold at the best prices which they could obtain, the difference being the gross profit, out of which the appellant company took the 5 per cent. commission referred to in para. 7 of the agreement, the balance being divided as follows: 10 per cent. to the manager of the Ramie Union, 45 per cent. to the Ramie Union, and 45 per cent. to the appellants.

The invoices for the goods were made out and sent by the appellants to the customers, the name of the Ramie Union never appearing on any of the trade documents as the vendors of those goods.

On brass plates affixed to the appellants' premises the appellants were described as agents of the Ramie Union, and in the Post Office Directory for 1916 the London address of the Ramie Union was given by the authority of the appellants as 70 and 71 Chiswell Street, but it was not proved that the authority of the Ramie Union was given for either of these things.

It was contended for the appellants that the Ramie Union traded not within but with the United Kingdom, and that the appellants were not agents of the Ramie Union within s. 41 of the Income Tax Act, 1842, but were purchasers from the Ramie Union.

The Commissioners confirmed the assessments, and on appeal their decision was affirmed by Sankey J.

The appellants appealed.

The appeal came on for hearing before the Court of Appeal (Swinfen Eady M.R., Warrington and Scrutton L.JJ.) on March 19, 1919. After it had been argued at some length the Court, not being satisfied that they had sufficient materials before them to dispose of the matter, made an order that unless the parties agreed within six months from date thereof to a further statement of facts the case stated should be remitted to the Commissioners to state certain facts therein stated. In pursuance of this order the parties agreed upon a further statement of facts which was embodied in a supplemental case, the effect of which sufficiently appears from the judgment of the Master of the Rolls.

The appeal having been restored to the paper was heard on November 29, 30, 1922.

Hon. Sir William Finlay K.C. and *A. M. Latter K.C.* for the appellants. Sankey J. held, we submit wrongly, that there was evidence upon which the General Commissioners could find, that the Ramie Union was trading in this country through its agents the appellants. The question is whether the Ramie Union exercised a trade or business within the United Kingdom and whether the appellants were its agents. The leading case is *Grainger & Son* v. *Gough* (1), where Lord Herschell laid down that there was a broad distinction between trading with a country and carrying on a trade within a country. The test is whether the appellants made contracts in this country for and on behalf of the Ramie Union. The contracts made by the appellants in England were made by them as principals: *Erichsen* v. *Last.* (2) See also *Watson* v. *Sandie & Hull* (3), where the tests adopted by both the judges are in favour of the contention that the appellants in this case were really in the position of principals and not agents

(1) [1896] A. C. 325, 335. (2) (1881) 8 Q. B. D. 414.
(3) [1898] 1 Q. B. 326.

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for the Ramie Union. That contention is also supported by *Cassaboglou* v. *Gibb.* (1) In *Ireland* v. *Livingston* (2) Lord Blackburn, then Blackburn J., said: "It is quite true that the agent who in thus executing an order, ships goods to his principal, is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him, and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them . . . . and just so does the property in the goods pass from the country producer to the commission merchant; and then, when the goods are shipped, from the commission merchant to his consignee. And the legal effect of the transaction between the commission merchant and the consignee, who has given him the order, is a contract of sale passing the property from the one to the other; and consequently the commission merchant is a vendor, and has the right of one as to stoppage in transitu." In *Cassaboglou* v. *Gibb* (1) the question turned upon the relation between the plaintiff and the defendants, whether it was that of vendor and purchaser or that of principal and agent.

[LORD STERNDALE M.R. What was the ground in that case for saying it was one of vendor and purchaser ?]

The passage in Lord Blackburn's judgment above cited.

In *Grainger & Son* v. *Gough* (3) it was held that a foreign merchant, who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom, does not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts, so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country. To render the foreigner liable the person selling in this country must be selling the foreigner's goods and not his own. Here there was no property in any goods in this country owned by the Ramie Union. Under the agreement the property in the goods passed to the appellants. If a foreigner abroad sells

(1) (1883) 11 Q. B. D. 797. (2) (1872) L. R. 5 H. L. 395, 408.
(3) [1896] A. C. 325.

goods to a person here he is trading with the country but is not exercising a trade in this country. In the Court below the appellants relied on *Englebert Tyres, Ld.* v. *Victor Tyre Co.* (1), where Phillimore L.J. in delivering the judgment of the Court, referring to the conditions of modern business, said that it was often convenient for a manufacturer or other producer to agree with some other person or company, whom he called the distributor, that the latter should buy all the producer's goods, or all those to be sold in a particular country or a particular district, and added: "Such a contract is one of sale and purchase." That, it is submitted, is this case. The most recent case in which the principle laid down in *Grainger & Son* v. *Gough* (2) was followed is *Greenwood* v. *F. L. Smidth & Co.* (3)

It is submitted that there was no evidence before the Commissioners upon which they could find either that the Ramie Union was exercising a trade within the United Kingdom or that any contracts were made in this country for and on behalf of the Ramie Union. The true effect of the transactions between the parties was the sale of the goods by the Ramie Union to the appellants and a resale by the latter to their own customers.

[They also referred to *Delage* v. *Nugget Polish Co.* (4)]

T. W. H. Inskip S.-G. and *R. P. Hill* for the respondents. We accept the test proposed as to whether the Ramie Union is exercising a trade in the United Kingdom. The only question here is whether the Ramie Union exercises a trade in this country by its agents the appellants. It is admitted that the onus is on the Crown to establish the agency.

The case stated never went back to the Commissioners to find further facts, but further facts were agreed upon by the parties and stated in a supplemental case. The matter must therefore be treated as if the further facts had been before the Commissioners. The only question therefore is whether there was evidence before them upon which they could come to the conclusion they did.

(1) Unreported.
(2) [1896] A. C. 325.
(3) [1922] 1 A. C. 417.
(4) (1905) 92 L. T. 682.

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It is submitted that the payments by the appellants to the Ramie Union were made with a view to financing the Union. As a person does not sell goods to another at mere cost price it would appear that the present case is not one of vendor and purchaser. We rely on the provisions of para. 7 of the agreement of July 13, 1909, as being inconsistent with the existence of the relation of vendor and purchaser between the parties.

[LORD STERNDALE M.R. On the face of the agreement it looks as if the appellants were liable to pay for all the goods invoiced to them. If so the del credere would be useless.]

It is submitted that the relation here was that of principal and agent: *Ex parte Bright.* (1)

The documents in the case show that charges were made by the appellants which could not have been made if the relationship was that of vendor and purchaser, such for example as the charge for travellers, and the arrangement as to the payment of costs of litigation.

Sir William Finlay K.C. replied.

LORD STERNDALE M.R. This is an appeal which comes before us in rather an unusual way. It was heard before this Court then differently constituted some three years ago upon a case stated by the Commissioners. During the argument I think not only the Court but counsel thought that the materials then before the Court were not sufficient in order to enable it to come to a satisfactory conclusion, and the case was accordingly adjourned and an order made in the following terms: "Unless the parties agree within six months from the date hereof to a further statement of facts, the case stated herein mentioned in the said order of the King's Bench Division be remitted to the Commissioners for the General Purposes of the Income Tax Acts for the Division of Finsbury for them to state the following further facts." Then there followed several heads: "(1.) Particulars of the agreement prior to 1909 referred to in para. 5 of the case and how business

(1) (1879) 10 Ch. D. 566, 570.

thereunder was carried out with all necessary documents. (2.) As to when and how payments were made of the invoiced amounts of goods by appellants to Ramie Union with specimens of invoices receipts and other documents. (3.) Correspondence leading up to the agreement of 1909." What that was for I do not know; I cannot imagine that the Court thought that they ought to construe the agreement by means of the correspondence leading up to it, but that was one of the matters about which information was asked. "(4.) As to the form of payments of the percentage due to Ramie Union and of the half-yearly accounts mentioned in para. 7 with specimens of relevant documents. (5.) Facts and documents relating to insurance and freight on transit to the United Kingdom, with specimens of bills of lading," etc.

Now I confess that at first I thought that procedure raised very great difficulties, because on the original case the Commissioners had come to this conclusion: They were of opinion that the assessments were rightly made and confirmed the same. That involved the finding by the Commissioners, which of course was a finding of fact, assuming there was any evidence to support it, that the Ramie Union was exercising its trade in this country through its agents, the appellants, who were the persons assessed, and who received the profits for the Ramie Union. As I say, I thought that difficulties were created by sending the case back for this further information, because it seemed to me that the proper course would have been to send it back in order that the Commissioners might say whether the additional information in any way altered the opinion which they had formed at first; that was what was done in the case of *Grainger & Son* v. *Gough*. (1) But the explanation that has been given to us I think gets rid of that difficulty, because it appears that the case was not sent back to the Commissioners in order that they might find, or that the parties might agree, facts which had not been before the Commissioners in the first instance, but only that there might be set out by agreement or by a finding of the Commissioners certain facts which were

(1) [1896] A. C. 325.

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before the Commissioners but which had not been stated in the case.

It is quite true that the facts to which I have referred and the facts which were before the Commissioners have been set out in very great detail, and in a great deal more detail than they were before the Commissioners, but they are only the details of facts that had been before them. Now that being so I think that the difficulty I saw in the absence of a further finding from the Commissioners disappears because the position is this, that the finding of the Commissioners is to be taken as based not only upon the facts set out in the original case, but as based also upon these additional facts which have been agreed upon between the parties. Therefore the question that arises before us is, Could the Commissioners in law find —which is another way of saying, was there evidence upon which they could find as they did, that these assessments were right?

I desire to state the facts as shortly as I can, though it is not possible to do so in a very few words. The Ramie Union is a Dutch company whose business consists in the manufacture and sale of incandescent gas mantles. Its head office and works are at Enschede in Holland, where practically all its banking and general business is transacted.

The appellant company is an English company. It was only incorporated in 1913, for the purpose of carrying on the business which had formerly been carried on by a partnership firm of Weiss & Biheller, and it is admitted that the business is a continuation of the same business carried on by a limited company instead of by individual partners. They are a very large importing company, and the business that is done in respect of the goods of the Ramie Union forms a very small part of the appellant company's business. Their predecessors, the firm of Weiss & Biheller, began dealing with the Ramie Union in 1906 or 1907. There were some agreements, and at one time the agreements were not reduced to writing. In 1908 there was a written agreement to which I do not think I need refer because it was superseded by the agreement under which the business is now carried

on dated July 13, 1909. [His Lordship read the terms of the agreement and continued:] That agreement was varied in 1911 by providing for the payment to the manager of the Ramie Union in addition to his salary of a commission of 10 per cent. out of the remaining difference referred to in para. 7 of the agreement.

The course of business is this. Generally the appellants obtain orders for mantles before they place any work with the Ramie Union. Sometimes they have only got a customer as they say in sight; they have not actually "booked" him, if I may use the expression, but they think they have got him, and I think the case shows that it generally turns out, indeed almost invariably, that they have. Sometimes it is said they buy for stock. That is an expression which is very difficult to understand on the facts as stated in the case and the supplemental case, because they did not really keep any stock in the ordinary sense at all. There was a time just after the war began when there was stock to the value of 2041*l.* not delivered to customers, but that was a very exceptional amount. The previous amounts which relate to the years with which we are dealing were in 1911 30*l.*; in 1912, 46*l.*; in 1913, nil; in 1914, 16*l.*, when we come to 1915, 2000*l.*, and then it is down again in 1916 to 130*l.* So it is evident that there was no stock kept in the ordinary sense.

What is meant by the word "stock" is described in para. 12 of the supplemental case. It is to this effect, that what is called stock generally consists of returned goods awaiting another customer. It may be said, in substance, that the whole of the purchases were purchases for customers, to be delivered to customers in England, whom they had either got secured by contract or had in sight at the time they gave the order to the Ramie Union.

The supplemental case shows that it was the practice of the appellants in many cases to pay the amount of the invoice price of what they ordered from the Ramie Union before they received the money from their customers. They paid it monthly, and they did not simply remit the money that

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they received from the purchasers. It is also shown with regard to some legal expenses that if they were not recovered from the other litigant in the action they were divided between the Ramie Union and the appellants. There does not seem to have been any system of insurance, and I find it rather difficult to make out exactly what the arrangements were with regard to freight; but as a rule they received the freight to an English port, and after that I do not quite know what was done; it varied in different cases. Sometimes the appellants paid the freight and charged it to the customer; sometimes the customer paid it himself and the price did not include freight. There are a number of other facts and details which are set out in the supplemental case which I do not think it is necessary for me to mention.

The question is whether upon these facts the Commissioners could find that this trade was being exercised by the Ramie Union in the United Kingdom.

The statutory provisions on which the question depends are s. 2, Sch. D, of the Income Tax Act, 1853, and s. 41 of the Income Tax Act, 1842. Sect. 2, Sch. D, of the Act of 1853 imposes a duty: "For and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom, and to be charged for every twenty shillings of the annual amount of such profits and gains."

Sect. 41 of the Act of 1842 provides that: "Any person not resident in Great Britain, whether a subject of Her Majesty or not, shall be chargeable in the name of . . . . any factor, agent or receiver, having the receipt of any profits or gains arising as herein mentioned, and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in Great Britain, and in the actual receipt thereof."

The question is, as I have said, whether the Ramie Union was exercising a trade within the United Kingdom. If it

was it seems to me to follow incontestably that it was so exercising it by means of the appellants as its agents. There is no other way in which it could do so.

I think a little confusion is sometimes occasioned by using as is constantly done, and not at all improperly, the words "exercising a trade within the United Kingdom," as synonymous with the words "carrying on business within the United Kingdom." I see that Atkin L.J. pointed out the difference in *Smidth & Co.* v. *Greenwood* (1), which was before us not very long ago. He said: "The question is whether the profits brought into charge are 'profits arising or accruing' to the respondents 'from any trade . . . . exercised within the United Kingdom' within the meaning of Sch. D of the Income Tax Act, 1853. The question is not whether the respondents carry on business in this country. It is whether they exercise a trade in this country so that profits accrue to them from the trade so exercised."

It is contended for the appellants that the Commissioners upon these facts and the agreement could not in law find otherwise than that the Ramie Union was not exercising a trade within the United Kingdom, but was merely selling to the appellants who, in their turn, resold, and that all the provisions of the agreement, which I have read, were merely for the purpose of defining the terms upon which there was to be an actual sale by the Ramie Union as principal to the appellants as principals, the appellants then as principals to do what they liked, as far as selling was concerned, with the mantles which they had bought.

With regard to this contention the first point to be noticed is that the appellants could not do what they liked with the mantles. They were bound to sell them at the best price that they could obtain for them. Another point to be noticed is that they did not buy them in the ordinary way, by which I mean they did not buy them from the Ramie Union, the Ramie Union adding on a profit and making its own profit by the sale; they took them over from the Ramie Union at the cost price of manufacture,

(1) [1921] 3 K. B. 583, 593.

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plus 10 per cent., which was merely for the overhead expenses.

A further point to be noticed is the very remarkable provision in the agreement that the appellants are to receive 5 per cent. for their general business expenses and del credere. Now del credere is a thing which is quite inappropriate to any such transaction as the appellants say existed in this case—namely, a mere sale by one person and a resale by that person to a third person. The question of del credere does not arise in such a case at all. What it means, as I understand it, is that the person to whom the del credere commission is paid guarantees to the person paying it that that person shall receive the amount for which the person to whom the del credere is paid sells the goods. That is very appropriate to the position of a person who is carrying on another person's business for him, but is entirely inappropriate to the position of principals buying and selling. It is certainly the case, as I have said, that it was the custom for the appellants to pay the invoices rendered to them by the Ramie Union for the goods irrespective of the question whether they had at that time resold the goods or whether they had at that time received the money. If they had resold them—and that of course is in the appellants' favour—it is explicable no doubt in two ways, one, that the Ramie Union so got its business financed, and the other that it was one way of fulfilling part of the appellants' obligations under their del credere agreement. But it certainly is in favour of the appellants.

Then there are two very important matters which are favourable to the appellants. One is that I do not think there is anything to show that any privity whatever was created between the ultimate purchaser and the Ramie Union or that any contract binding the Ramie Union was made by the appellants. That is an important matter, but it is not conclusive. It was admitted by counsel for the appellants during the argument that it was not conclusive, because there might be a case where there would be an agency, such as is said to exist in the case before us, although no contract was made binding the so-called principal or the alleged principal.

Again in *Smidth & Co.* v. *Greenwood* (1) I think I intimated my opinion that that fact was not conclusive, and I notice that Atkin L.J. there took the same view. He said (2): "There are indications in the case cited"—that was the well-known case of *Grainger & Son* v. *Gough* (3)—"and other cases that it is sufficient to consider only where it is that the sale contracts are made which result in a profit. It is obviously a very important element in the inquiry, and if it is the only element the assessments are clearly bad. The contracts in this case were made abroad. But I am not prepared to hold that this test is decisive. I can imagine cases where the contract of resale is made abroad, and yet the manufacture of the goods, some negotiation of the terms, and complete execution of the contract take place here under such circumstances that the trade was in truth exercised here." Therefore that, although no doubt in favour of the appellants, is not conclusive.

Then there is another point which was argued strenuously before us and that is this, that here the property in the goods did not remain in the Ramie Union but passed to the appellants. It was said that where that is the case, the person to whom the property in the goods passes cannot be an agent but must be a principal in the transaction: I mean a transaction similar to the one with which we are dealing.

Now there again I think that is a very important matter, but I do not think it is conclusive. For the reasons I have given it seems to me that it cannot be said that there were not facts in this case, in the first place arising on the agreement itself, upon which the Commissioners could come to the conclusion which they did. I rather think that the late Master of the Rolls intimated his opinion when this appeal first came on for hearing before this Court that there was something in the agreement which called for explanation. There were facts arising, first upon the agreement itself and then upon the circumstance, that this was a handing over at cost price and then a dealing with the goods by the appellants

(1) [1921] 3 K. B. 583. (2) [1921] 3 K. B. 593.
(3) [1896] A. C. 325, 336.

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in a way, and the only way, which could produce profit to anybody, and also, what is perhaps not of great importance, the fact that in one case at any rate the appellants made use of paper with the Ramie Union's name upon it in which they speak of themselves as the London House and in which they, by using that paper, gave the address in London where they carried on business as the address here of the Ramie Union, and there are other documents in which they speak of "our works." All these things are small and explicable, but they are circumstances which have to be taken into account. It seems to me, looking at the whole matter, that it is quite impossible to say that there were not materials here upon which the Commissioners could come to the conclusion they did, and therefore that the appeal must be dismissed with costs.

ATKIN L.J. I agree. The question is whether or not there are annual profits arising to the Ramie Union from a trade exercised in the United Kingdom, and if there are such profits so arising, then there comes the question whether or not there is a factor or agent in this country having the receipt of any profits or gains so arising. It is said that there is no trade exercised here by the Ramie Union, and that there is no factor or agent of it here having the receipt of any such profits or gains.

Now the two points which I wish to deal with are those made by Sir William Finlay in his forcible argument on behalf of the appellants. What he said was that there were two circumstances which made it clear that the appellants in this case could not be charged as agents in respect of these profits: in the first place, no contracts were made in this country by the Ramie Union either by itself or by its agents; in the second, there never was any property in any goods in this country owned by the Ramie Union. And he contended that if the Ramie Union has not made contracts in this country and if it has no property in this country, then it cannot be said to be exercising a trade within this country.

Now it does not appear to me that those two matters are

conclusive. On the first point, as to the making of contracts, I have no doubt myself that in this case the contracts of sale to customers, from which the profits arose, were not contracts to which the Ramie Union was a party. The appellants never made, and never were intended to make, contracts which bound the Ramie Union. Nevertheless it appears to me that the contracts might be fairly said to be made for or on behalf of the foreign principal, the Ramie Union. Indeed, it is a matter of common knowledge and common practice and has been known in these Courts for at least 100 years, that agents in this country making contracts for foreign principals, or agents abroad making contracts for the principals in this country, ordinarily have no authority to bind their principals to the contracts and do not in fact so bind their principals. Nevertheless, the mere fact that a foreign agent making a contract for or on behalf of his principal does not create privity of contract between the customer and the foreign principal does not prevent the relation of principal and agent from existing between the two parties. It is only necessary to cite the well-known case of *Ireland* v. *Livingston* (1) and the case of *Cassaboglou* v. *Gibb* (2), to show that the proposition is well established. Therefore a person may act through an agent even though that agent does not make contracts that bind him.

The other point is on the question of property in the goods. It appears to me that a foreign principal may well as part of his trade send his goods to this country to be sold for and on his behalf, and yet so conduct the business that the property in the goods for the purpose of the trade passes to the agent. It is common practice, in cases such as I have mentioned, that the agent in this country makes advances in respect of goods which he is selling for an admitted foreign principal, and by making those advances he obtains, at any rate, a special property in the goods which may amount in value to the full value of the goods, and yet it cannot be suggested that that fact prevents the foreign principal from carrying on the

(1) L. R. 5 H. L. 395. (2) 11 Q. B. D. 797.

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business of selling goods in this country. I see no distinction in logic or in business which would make the case where the agent obtains the complete property so destructive of the relation of principal and agent that it cannot be said to exist. I see no such substantial inconsistency in that fact as to cause this Court to come to the conclusion that where the property has passed to a so-called agent the relation of principal and agent must necessarily cease. I assume for the purposes of this case that the property in these goods does in fact pass to the appellants. I am far from satisfied that it does so in fact. I think it would probably require a very careful examination of the whole of the circumstances and the documents to see whether that is the fact or not. But I assume it, and assuming it, I see nothing in the fact to prevent the relation of principal and agent between the foreign manufacturer, the Ramie Union, and the appellants.

In substance, therefore, the question is whether or not the Ramie Union is in fact carrying on its trade in this country through the appellants. The Commissioners have found that it is, and it appears to me, for the reasons which have been mentioned by my Lord, and which I need not go through in detail, that there is a considerable body of evidence upon which they could properly so find. I will only refer to two which appear to me to be salient facts—namely, that the alleged price at which it is suggested the appellants had bought, and the only price referred to in the agreement, is a cost price, the price of manufacture, what is called the absolute cost, plus 10 per cent. which would cover overhead charges. That appears to me to be an unusual circumstance if in fact the appellants were in the ordinary position of purchasers from the Ramie Union.

The other fact is the matter of the del credere commission, as to which it appears to me no effective explanation has been offered or indeed could be given if the real relation between the parties was not that of principal and agent but of independent vendor and purchaser.

There are other circumstances, such as the use by the

appellants of the Ramie Union's paper, and so on, to which I need not refer.

The only question however that we have to determine is whether there was evidence upon which the Commissioners could find in favour of the Crown. I think there was such evidence, and in my opinion therefore the appeal should be dismissed.

YOUNGER L.J. I am of the same opinion, and I do not think I can usefully add anything to the judgments which have been delivered.

Appeal dismissed.

Solicitors for appellants: *Clifford Turner & Hopton.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

W. I. C.

MARCHBANK *v.* CAMPBELL.

1922
Nov. 15, 30.

Landlord and Tenant—Dwelling House—Conversion into Flats—Standard Rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1, 2, 3 *and* 9.

By s. 12, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "For the purposes of this Act, except where the context otherwise requires:—(*a*) The expression 'standard rent' means the rent at which the dwelling house was let on August 3, 1914, or, where the dwelling house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling house which was first let after the said August 3, the rent at which it was first let."

By s. 12, sub-s. 3: "Where for the purpose of determining the standard rent or rateable value of any dwelling house"—which term includes a part of a house let as a separate dwelling—"to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling house is comprised, the county court may, on application by either party, make such apportionment as seems just. . . . ."

By s. 12, sub-s. 9: "This Act shall not apply to a dwelling house erected after . . . . April 2, 1919, or to any dwelling house which has been since that date and was at that date being bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements. . . . ."

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In December 1920, the upper part of a dwelling house in the Metropolis, which was in August, 1914, let as a whole at a rent of 70*l.* a year, was converted into a separate flat or tenement by means of structural and other alterations and let to a tenant at a rent of 150*l.* a year. The tenant of the flat subsequently claimed apportionment and a return of the rent paid in excess. The flat, as the Court found, was a dwelling house within the meaning of the above Act, and in order to ascertain the standard rent under s. 12, sub-s. 1 (*a*), it was necessary to decide whether the flat was first let on August 3, 1914, or in December, 1920:—

Held, that this question was one of fact, which depended on the nature and extent of the structural alteration. It was not intended by s. 12, sub-s. 9, of the Act that apportionment should always be made unless the structural alteration amounted to complete reconstruction within that sub-section.

In considering whether apportionment should be made under s. 12, sub-s. 3, of the Act, the county court judge should have regard to the physical identity of the dwelling house in each case. To justify a finding that a part of a dwelling house was first let when it was first let separately there must be a new and separate dwelling house not merely in law by virtue of a new and separate letting, but also in fact, by virtue of substantial structural alteration.

Judgment of Atkin L.J. in *Sinclair* v. *Powell* [1922] 1 K. B. 393, 407 applied.

APPEAL from Marylebone County Court.

The following statement of facts is taken from the judgment:—

"No. 25 Upper Gloucester Place, W., consists of a basement, ground floor and three floors above. It was let as a whole in 1914 at a rack rent of 70*l.* a year. In 1920, the respondents bought for 550*l.* the lease of this house, with 7½ years unexpired, at a ground rent of 40*l.* a year. The respondents are in partnership as masseuses, and bought this house with the intention of living and practising their profession in the lower part, letting off the two upper floors as a separate flat. They spent about 200*l.* in decoration and repair. About 90*l.* of this was spent on the two upper floors, partly in decoration and partly in structural alteration. A partition, with locked door and fanlight, was built on the second floor landing, shutting off the two upper floors from the rest of the house. One of the rooms on the second floor, formerly a bedroom, was converted into a kitchen by building a dresser, fixing a gas cooker and two sinks, and laying on gas and water. A loft in the roof was floored for use as a

boxroom and the access to it was enlarged. Separate gas and electric meters were fixed and some minor work was done, such as picture rails and electric-light plugs. A bell was fixed at the front door to ring in the flat.

"In December, 1920, the appellant became the first tenant of this upper part. The tenancy is for three years at a rent of 150*l.* a year. She has the right to the use, in common with the respondents, of the staircase to the second floor the hall, the water-closet and bathroom (which are on the ground floor) and one of the coal cellars. One of the cellars was appropriated to her sole use, but it is not clear that she has any exclusive right to it. No evidence was given that the appellant's tenement had been separately rated. It was stated that the rateable value in 1922 was 81*l.* This I understand to mean the rateable value of the whole house. The appellant's tenement was therefore created by the separate letting for residence of part of a house which, at the time of the separate letting, was subject to the Act of 1920."

The tenant paid rent until February 28, 1922, at 12*l.* 10*s.* per month. He then claimed an apportionment and return of the rent which he alleged to have been paid in excess. The county court judge held that the house had not been converted into two or more separate and self-contained flats within s. 12, sub-s. 9, of the Act of 1920. But he held that as the result of the alterations the upper floors became a tenement substantially different from before and not part of the whole undivided house as let in 1914: see *Sinclair* v. *Powell* (1), judgment of Atkin L.J.

The tenant appealed on the ground that the county court judge was wrong in holding that the identity of the house and/or of the two top floors had been destroyed and in holding that in consequence the two top floors had not, previously to the letting in December, 1920, been let as part of a dwelling house.

J. D. Casswell for the tenant (appellant). The result of s. 12, sub-s. 9, is that except in certain cases there given,

(1) [1922] 1 K. B. 393, 407.

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where a dwelling house is divided into separate flats or tenements, the tenant can claim apportionment under sub-s. 3. These exceptions are (*a*) dwelling houses erected since April 2, 1919, (*b*) dwelling houses in course of erection at that date, and (*c*) dwelling houses being bona fide reconstructed by way of conversion into separate self-contained flats or tenements at that date or since. These are the only cases not covered by the Act and the present case is not among them. One of the objects of s. 12, sub-s. 9, is to prevent the identity of a dwelling house being destroyed by the erection of a mere partition, which would not be a bona fide conversion. The decision in *Woodward* v. *Samuels* (1) supports this view, although that case was distinguished by Lush and Sankey JJ. in *Sinclair* v. *Powell* (2), which was affirmed by the Court of Appeal on other grounds. The alterations to the house in *Sinclair* v. *Powell* (2), were all carried out before the passing of the Act of 1920, and that case is therefore distinguishable from the present.

Further, the alterations by the landlord did not comply with the requirements of the Public Health Act, 1875, s. 35, and the Public Health Act, 1907, s. 23, which are that each "dwelling house" shall have a separate water-closet. He cannot therefore claim that this flat is a "dwelling house."

H. J. Casey for the landlords (respondents). The whole identity of the dwelling house has been altered since 1919. The upper flat was first let within the meaning of the statute in December, 1920. The case is covered by *Sinclair* v. *Powell* (2) and the observations of Atkin L.J. in his judgment apply here, so that no case for apportionment is made out.

Cur. adv. vult.

Nov. 30. The judgment of the Court (Darling and Salter JJ.) was delivered by

SALTER J. This was an application by the appellant, the

(1) [1920] W. N. 82.
(2) [1921] W. N. 206; (C. A.) [1922] 1 K. B. 393, 407.

tenant, for apportionment under s. 12, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and an action under s. 14 of that Act to recover alleged overpayments of rent. It was contended for the respondents, the landlords, that the case fell within s. 12, sub-s. 9. This contention was rejected and no appeal is made on this point. The county court judge dismissed the application on the ground that it was not necessary to have recourse to apportionment in order to determine the standard rent of the applicant's dwelling house. The question is whether, upon the facts, he was right in law in so deciding.

[After the above statement of facts the judgment continued :] It is clear that this tenement is a " dwelling house " within the meaning of the Act. The question is whether apportionment is necessary for the purpose of determining the standard rent of that dwelling house. Sect. 12, sub-s. 1 (*a*), lays down the rule, and the only rule, for determining the standard rent of every dwelling house. The words " except where the context otherwise requires " may qualify the other definitions in sub-s. 1, or some of them, but do not seem to me to apply to para. (*a*). The three classes into which dwelling houses are divided comprise every possible case. The standard rent of every dwelling house is the actual rent of that dwelling house at a fixed date. The question, in the case of every dwelling house, is at what date is the actual rent of this dwelling house to be taken for the purpose of determining its standard rent ? When the dwelling house in question is a dwelling house in the ordinary sense, a house let as a whole, there is no difficulty in placing it in one or other of the three classes. But where the applicant's tenement is only a " dwelling house " by virtue of the Act, created by letting separately a room, or a storey, or some other portion of a house, then it may be a matter of some difficulty to determine in which of the three classes such dwelling house is to be placed. In this case, the whole was let, as a whole, on August 3, 1914, and the part was first separately let in December, 1920. The question is whether the part is a dwelling house which was let on August 3, 1914, or " a dwelling-

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house which was first let after the said third day of August." If the latter, the standard rent of the part is the actual rent of the part in December, 1920, and no apportionment is necessary to determine the standard rent. If the former, the standard rent of the part is the actual rent of the part on August 3, 1914. This can only be ascertained by an apportionment of the actual rent of the whole at that date. In such a case some one must make a binding apportionment, and sub-s. 3 empowers the county court to make it. The county court judge must ascertain the date at which the actual rent of the applicant's tenement is to be taken. If at that date the tenement had a separate rent of its own, no apportionment is necessary and the application fails. If, at that date, the tenement had no separate rent, but was let as part of a whole, then he must make an apportionment.

The question in this case is, what are the considerations which should guide a judge in deciding (to take the present case) whether this flat was first let in December, 1920, or was let on August 3, 1914. In my opinion this is a question of fact and depends on the nature and extent of the structural alteration. It is not, I think, to be inferred from the terms of s. 12, sub-s. 9, that apportionment must always be made unless the structural alteration amounts to complete reconstruction within that sub-section. Sub-ss. 2 and 3 read together seem to me to imply that, in order to ascertain the actual rent of a dwelling house such as this flat, it will sometimes be necessary and sometimes unnecessary, to resort to apportionment. It is a question of the physical identity of the applicant's dwelling house. To justify a judge in finding that the part was first let when it was first let separately there must be, in his opinion, not merely a new and separate dwelling house in law, by virtue of a new and separate letting, but a new and separate dwelling house in fact, by virtue of substantial structural alteration.

This view is, I think, in accordance with the observations of Atkin L.J. in *Sinclair* v. *Powell* (1): "If the part of a house was not let as a separate dwelling in August, 1914, you may

(1) [1922] 1 K. B. 393, 407.

show that substantially in the form in which it now is it existed and was let as part of a whole house or a larger tenement in August, 1914, and can get the rent apportioned. But if the part has been substantially altered so that you cannot fairly predicate of it that in its present form it was, as part of a whole, let in 1914, I do not think that apportionment is possible. The apportioned values may be entirely misleading, as where by structural alterations the upper bedrooms of a house, ordinarily I suppose the least valuable, have become, when fitted as a separate tenement, of greater value than the lower floors." One of the objects of the Act, so far as it deals with tenancy, is to promote the provision of dwellings. When a landlord, by enterprise and expenditure in altering and adapting a large house, has provided two or three decent and separate homes where only one existed before, it seems reasonable that he should be allowed to get what rent he can for the new dwelling houses thus created. But if, with little or no preparation, by mere separate letting, he houses two or three families in a building designed to accommodate one, it is clear that the Act would be defeated if he could claim to base the standard rents on the actual rents thus obtained.

In this case, in view of the facts above set out, I think there was evidence on which the county court judge could find, as he did, that the respondents had created a new dwelling house in fact, substantially different from the four upper bedrooms of the original house—something of which it could not be fairly said "that, in its present form, it was, as part of a whole, let in 1914." If so, I think he was right in law in deciding that the appellant's tenement was a dwelling house which was first let after August 3, 1914, and that no apportionment was necessary to determine the standard rent of it.

The appeal therefore fails.

Appeal dismissed.

Solicitors for appellant: *Simon, Haynes, Barlas & Ireland.*
Solicitors for respondents: *Downer & Johnson.*

F. P. F.

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Nov. 22, 30.

WOODHEAD *v.* PUTNAM.

Landlord and Tenant—Dwelling House—Conversion into Flats—Standard Rent—Apportionment—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12.

On August 3, 1914, a house in Weston-super-Mare was let as one house at a rent of 60*l.* In May, 1919, the second floor of the house was let separately to the respondent at a rent of 55*l.*, but no structural alterations were made in the premises. This floor was not separately rated. In 1922 the respondent applied for an apportionment of the standard rent of the house. The county court judge held that s. 12, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied, and that there must be an apportionment :—

Held, that the fact that in May, 1919, when the second floor was let to the respondent, the house was not subject to any Rent Restriction Act, was for this purpose an irrelevant circumstance, and that the county court judge was entitled on the facts to make an apportionment.

APPEAL from Weston-super-Mare County Court.

An application was made by Mrs. Woodhead, hereinafter called the respondent, for an apportionment of the rent of 9 Ellenborough Crescent, Weston-super-Mare, and comprising a suite of rooms in her occupation on the second floor of that house. On that application the following facts were proved : On August 3, 1914, 9 Ellenborough Crescent, which consisted of a ground floor and upper floors, was let as one house at a rent of 60*l.*, and on May 3, 1919, was relet at the same rent for three years to one Gibbs, who made no structural alterations in the premises but installed water and gas on the second and third floors, and on May 19, 1919, let the second floor to the respondent for three years at a rent of 55*l.* and the third floor to another tenant for three years at a rent of 45*l.* These suites of rooms were not separately rated. In May, 1920, Gibbs assigned the reversion of the term to Mrs. Putnam, hereinafter called the appellant, who thus became tenant of the whole premises subject to the leases to the respondent and the tenant of the third floor. In March, 1922, the freeholder served the appellant with a notice increasing her rent, and thereupon she served the respondent with a similar notice. Thereupon the respondent made this application for an apportionment of the standard rent of the

house. For the appellant it was contended that as the premises did not come within the scope of the Rent Restriction Acts till the passing of the Act of 1920, the rent at which the respondent's suite of rooms was let as a separate dwelling house in May, 1919—namely, 55*l.*—was the standard rent within s. 12, sub-s. 1 (*a*), of the Act, and therefore, the rent being fixed, there was nothing to apportion.

The county court judge held that s. 12, sub-s. 3, of the Act applied (1) and that there must be an apportionment. He accordingly declared that the standard rent was 60*l.* for the whole house, and that 20*l.* was the apportioned part applicable to respondent's suite of rooms; but he gave the appellant leave to appeal.

Wethered for the appellant. The county court judge wrongly interpreted *Sinclair* v. *Powell* (2), which he considered bound him to apportion the rent. The Act of 1920 applies to a part of a house let as a separate dwelling: s. 12, sub-s. 2; and if a house is first let after August 3, 1914, the rent at which it was so first let is the standard rent: s. 12, sub-s. 1 (*a*). Accordingly, the rent at which the respondent's suite of rooms, which first became a separate dwelling in May, 1919, was then let, is the standard rent for the purposes of the Act, and therefore there is nothing to apportion. The Divisional Court in *Sinclair* v. *Powell* (3) dealt with the earlier case of *Woodward* v. *Samuels* (4) and said that the whole point in that case was that the building, when it was divided into flats was, as regards rent, within the Act, whereas in the case then under consideration the building, when it was converted into flats, was not within the Act, and, therefore, the landlord could deal with it as he pleased. That is precisely the present case.

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 3: "Where, for the purpose of determining the standard rent . . . . of any dwelling house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed . . . . the county court may . . . . make such apportionment as seems just. . . ."

(2) [1922] 1 K. B. 393.

(3) [1921] W. N. 206.

(4) [1920] W. N. 82; 89 L. J. (K. B.) 689.

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It is true that in *Sinclair* v. *Powell* (1) in the Court of Appeal, certain observations of Bankes and Atkin L.JJ. create some difficulty, but those observations were obiter.

[He also referred to *Phillips* v. *Barnett*. (2)]

Croom-Johnson for the respondent. All dwelling houses within the prescribed rental limits are brought within the Act of 1920 save those erected after or in course of erection on April 2, 1919: s. 12, sub-s. 9. The Act is thus retrospective and brings within its scope the suite now in question, which is not a separate self-contained flat as was the case in *Sinclair* v. *Powell*. (1) Being brought within the scope of the Act, it follows that the rent is subject to apportionment. Even if this contention as to the effect of s. 12, sub-s. 9, is wrong, the respondent's suite of rooms was brought within the scope of the Act directly the appellant gave notice purporting to increase the rent; the question then instantly arose as to the standard rent.

Wethered in reply. Sect. 12, sub-s. 9, has no bearing upon this question. It merely says that certain premises are to be outside the Act.

Cur. adv. vult.

Nov. 30. The following judgment of the Court (Darling and Salter JJ.) was read by

SALTER J. In this case a dwelling house was let as a whole on August 3, 1914, at a rent of 60*l.* a year. On May 19, 1919, the four rooms on the second floor were let to the respondent for three years at a rent of 55*l.* a year. On July 2, 1920, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, came into force and both the original house and the respondent's flat became subject to it. The flat has never been separately rated. On March 28, 1922, the landlord served a notice to increase the rent of the flat from 55*l.* to 59*l.* a year. The respondent then applied for an apportionment of the rent of the whole house for the purpose of ascertaining the standard rent of the flat. The application was granted and the landlord appeals. We have to determine

(1) [1922] 1 K. B. 393. (2) [1922] 1 K. B. 222.

whether, upon the facts, the county court judge was right in law in making an apportionment.

I think that s. 12, sub-s. 3, of the Act empowers the tenant of any tenement to apply for and to obtain apportionment if (*a*) his tenement is a "dwelling house" to which the Act applies, and (*b*) apportionment is necessary for the purpose of determining the standard rent of the applicant's "dwelling house." Where the applicant's dwelling house is separately rated, its rateable value may bring it within the Act; the only question then will be the necessity for apportionment. But where, as in this case, the applicant's dwelling house has never been separately rated, both questions have to be determined. It matters not which of the two the judge considers first. If he considers first whether the applicant's dwelling house comes within the Act, that depends on its standard rent. The standard rent is the actual rent at a fixed date, and the question therefore is, what is the date at which the actual rent of the applicant's dwelling house must be taken in order to determine its standard rent. If the judge considers first whether apportionment is necessary in order to determine the standard rent of the applicant's dwelling house, that depends on whether the actual rent of the applicant's dwelling house is to be taken at a date when it had a separate rent of its own, or at a date when it had no separate rent and was let as part of a whole. The question is in each case the same: What is the date at which the actual rent of the applicant's dwelling house is to be taken? In this case the judge had to determine whether the applicant's rooms were let on August 3, 1914, or were first let on May 19, 1919. If the former, apportionment was necessary; if the latter, unnecessary. The question is one of fact. He found that these four rooms were let on August 3, 1914.

It is not necessary in this case to consider whether, if there had been substantial structural alteration, the county court judge could have been justified in finding that the applicant's rooms were first let on May 19, 1919. It is admitted, not only that there was no reconstruction within sub-s. 9, but that there was no structural alteration which could support

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a contention that a new and different dwelling house had in fact been created. On the facts before the Court, not only was there evidence that the applicant's rooms were let on August 3, 1914, but there was no evidence on which any other conclusion could have been properly reached. The standard rent of the applicant's "dwelling house"—her four rooms—was therefore the actual rent of those rooms on August 3, 1914. This could only be ascertained by apportionment. The decision was therefore right.

It was urged upon us that on May 19, 1919, when these rooms were let to the applicant, the house was not subject to any Rent Restriction Act, and this is so. This point was relied on by the Divisional Court in *Sinclair* v. *Powell.* (1) With great respect, the fact seems to me to be irrelevant. It is, no doubt, reasonable to suggest that where, at the time of the division, the whole house is free from restriction, the landlord should be allowed to base the standard rent of the dwelling houses he then creates on the actual rents then obtained for them. The statute, however, does not seem to me to have so provided. The question is, were the applicant's four rooms in fact let on August 3, 1914, or were they in fact first let on May 19, 1919? I think that the answer to this question cannot depend on when the whole house became, or whether it ever became, subject to restriction. To entitle a tenant to apportionment under s. 12, sub-s. 3, it is not necessary that the "property" in which the applicant's dwelling house is "comprised" should itself be a dwelling house or should be subject to the Act. It may, or may not, be the case that, in view of the notice to increase the rent, the fixing of the standard rent of the applicant's dwelling house may show that a part of the actual rent is irrecoverable by the landlord, or may enable the tenant to claim repayment of sums overpaid. This seems to me immaterial. The question whether claims can be based on the standard rent, when determined, does not seem to me to affect the method of determining the standard rent, nor the right of the tenant or of the landlord, to have the standard rent determined,

(1) [1921] W. N. 206.

and to have an apportionment made, when apportionment is shown to be necessary for the purpose of determining the standard rent. The appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Robins, Hay, Waters & Hay, for Tyrrell & Barnes, Weston-super-Mare.*

Solicitors for respondent: *Cameron, Kemm & Co., for John Hodge & Co., Weston-super-Mare.*

J. S. H.

BROOKS, APPELLANT *v.* BLOUNT, RESPONDENT.

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Dec. 14.

Children—Wilful Neglect of Child in Manner likely to cause unnecessary Suffering or Injury to Health—Custody of Child—Legal Presumption—Voluntary Separation Agreement between Husband and Wife—Custody of Child given to Wife—Rebuttal of Presumption that Father had legal Custody of Child—Children Act, 1908 (8 *Edw.* 7, *c.* 67), *s.* 12, *sub-s.* 1; *s.* 38, *sub-s.* 2.

By the Children Act, 1908, s. 38, sub-s. 2: "Any person who is the parent . . . . of a child . . . . shall be presumed to have the custody of the child. . . . ."

A parent of a child cannot by a voluntary agreement, whether oral or in writing, get rid of the legal presumption created by s. 38, sub-s. 2, of the Children Act, 1908, that for the purposes of that Act he has the custody of the child so as to render him liable under s. 12, sub-s. 1, of that Act for wilfully neglecting the child.

CASE stated by justices for the county of Northampton.

An information was preferred by the appellant, William Brooks, under s. 12 of the Children Act, 1908, against the respondent, Frank Blount, for that he on July 21, 1922, and divers previous dates, being a person over the age of sixteen years, and having the custody, charge, or care of a certain child, to wit, Hilda Kate Blount, aged five years, unlawfully and wilfully did neglect such child in a manner likely to cause her unnecessary suffering or injury to her health.

Upon the hearing of the information on August 9, 1922, it was admitted or proved.

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The respondent was married to Linda Beatrice Blount at Kettering on July 22, 1916. There was issue of the marriage one child—namely, the said Hilda Kate Blount—who was born on April 22, 1917.

On September 1, 1920, the respondent entered into a written agreement with his wife for separation of which the following were express terms :—

"4. The said Frank Blount shall during the joint lives of himself and the said Linda Beatrice Blount if the said Linda Beatrice Blount shall continue to perform and observe the stipulations herein contained and on her part to be performed and observed pay to the said Linda Beatrice Blount the clear weekly sum of one pound five shillings . . . . the first payment to be made on Saturday the 21st August, 1920.

"5. The said Linda Beatrice Blount shall out of the provision made for her by this agreement or otherwise . . . . in all respects support and maintain herself child and dependents."

"7. The said Linda Beatrice Blount shall have the sole custody and control of the said child and of her education and bringing up until she attains the age of 21 years without any interference whatsoever on the part of the said Frank Blount but the said Frank Blount shall be entitled to have reasonable access and communication with the said child at any time by appointment but not oftener than once a week."

The respondent shortly after the signing of the said agreement failed to carry out his part thereunder. For the first few weeks he remitted the said weekly payments of 25*s*., then he paid 15*s*. a week, later he varied the amount of his payments, and thereafter ceased to make any payment whatever. The only payment made by him to his wife during the twelve months preceding the hearing before the justices was 30*s*. in May, 1922.

The arrears under the agreement amounted on August 9, 1922, the date of the hearing, to about 100*l*.

The wife was on August 9, 1922, destitute and unable to support the respondent's child, who accordingly on the said

date, and for a long time before it, depended for her support entirely upon the charity of the wife's parents.

The child had not suffered injury to her health.

It was contended on behalf of the respondent: (*a*) that by reason of the above-mentioned agreement for separation he had not the custody of the said child and consequently had committed no offence under the above-mentioned section; (*b*) that the child had suffered no injury to her health and that therefore no offence had been committed under the above-mentioned section.

It was contended on behalf of the appellant: (*a*) That the respondent was liable under s. 12, sub-s. 1, of the Children Act, 1908, to provide for his child and that the above-mentioned agreement for mutual separation could not discharge him from his liability nor could he discharge himself from that liability by delegating it to another person. (*b*) That by reason of s. 38, sub-s. 2, of the Act the respondent must be presumed and deemed to have the custody of the child in law. (*c*) That the fact that the child had not suffered actual injury to her health was immaterial, (i.) seeing that having regard to s. 12, sub-s. 1, of the Act the respondent had neglected the child in a manner likely to cause her unnecessary suffering or injury to her health, inasmuch as he had failed to provide adequate food, clothing, medical aid or lodging for the child; and (ii.) having regard to s. 12, sub-s. 2, of the Act since actual suffering or injury to health or the likelihood of such suffering or injury to health was obviated by the action of another person.

The justices dismissed the information, being of opinion that having regard to the terms of the separation agreement the respondent had not in fact the custody of the child, and that the presumption of law in s. 38, sub-s. 2, of the Act that "Any person who is the parent of a child . . . . shall be presumed to have the custody of such child . . . ." was rebutted by the said agreement and consequently that the respondent had committed no offence under the above-mentioned section of the Act,

The question upon which the opinion of the Court was

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desired was whether the justices on the above statement of facts came to a correct decision in point of law, and if not what should be done in the premises.

W. T. Monckton for the appellant. The justices were wrong in holding that the respondent had not the custody of the child by reason of the terms of the separation agreement, and that the presumption created by s. 38, sub-s. 2, of the Children Act, 1908, that he had the custody of the child was rebutted by the agreement, and that therefore he had not committed any offence under s. 12, sub-s. 1, of the Act. Notwithstanding that the respondent was living apart from his wife and his child he did not cease to have the custody of the child, so as to make him liable under s. 12, sub-s. 1, for neglecting it. Sect. 38, sub-s. 2, expressly provides that the "parent . . . . of a child or young person . . . . shall be presumed to have the custody of the child or young person, and as between father and mother the father shall not be deemed to have ceased to have the custody of the child or young person by reason only that he has deserted, or otherwise does not reside with, the mother and child or young person." It is not possible for a father by a voluntary agreement to get rid of his legal liability towards his child. In *Poole* v. *Stokes* (1) the father not only supplied his wife from whom he was living apart with money in order to support the children, but when he found his wife was not supporting the children he gave information to the Society for the Prevention of Cruelty to Children, who took proceedings against both the father and the mother for neglecting the children, and it was held that the father was liable notwithstanding that he was supplying his wife with sufficient money to maintain the children.

Bernard Campion for the respondent. Before a person can be convicted under s. 12, sub-s. 1, of the Children Act, 1908, for neglecting a child, it must be shown that he has the custody, charge or care of the child and also that he has acted in a manner likely to cause suffering or injury of health

(1) [1914] W. N. 123; 110 L. T. 1020.

to the child. The question whether a person has the custody, charge or care of a child is one of fact for the magistrate to determine: *Liverpool Society for the Prevention of Cruelty to Children* v. *Jones.* (1) The presumption created by s. 38, sub-s. 2, of the Act of 1908—namely, that a parent has the custody of his child—is one capable of being rebutted, and it is rebutted by an agreement for separation between a husband and wife under which the wife has the sole custody of the child, provided the agreement is not a fraudulent one, in the same way as it would be rebutted by an order of the Court made at the instance of one of the parents in which the custody of the child is given to one of the parents, thereby depriving the other parent of the custody. In *Poole* v. *Stokes* (2) the agreement for separation was not in writing, and further there was no express provision in the agreement between the husband and wife that the wife should have the custody of the children. The respondent cannot be found guilty of neglecting his child merely because he did not carry out the terms of the agreement when he knew that the child was being looked after by his wife's parents.

W. T. Monckton in reply. Although the presumption created by s. 38, sub-s. 2, that a parent has the custody of a child may be rebutted as between the father and mother, yet as between the parent and the State the presumption cannot be rebutted: see also The Custody of Infants Act, 1873, s. 2. It is clear from s. 12, sub-s. 2, that the fact that actual suffering to the child was obviated by the action of the parents of the child's mother will not prevent the respondent from being convicted of an offence under s. 12, sub-s. 1.

LORD HEWART C.J. This case raises a point of some importance under the Children Act, 1908. An information was preferred by the appellant against the respondent under s. 12 of the Children Act, 1908, for that he being a person over the age of sixteen years and having the custody, charge or care of a certain child unlawfully and wilfully did neglect

(1) [1914] 3 K. B. 813. (2) [1914] W. N. 123; 110 L. T. 1020.

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such child in a manner likely to cause her unnecessary suffering or injury to her health. The justices heard the information and dismissed it. [His Lordship having stated the facts set out in the case continued:] The contention on behalf of the respondent was that by reason of the agreement for separation made by him with his wife he had not the custody of the child and consequently had committed no offence under s. 12 of the Act of 1908. The justices did not enter upon the consideration of the question whether the respondent had or had not been guilty of wilful neglect. They were satisfied that the separation agreement itself was a sufficient answer to the charge and that in view of the terms of the agreement the respondent had not in fact the custody of the child and that the presumption of law in s. 38, sub-s. 2, of the said Act was rebutted by the agreement, and consequently that the respondent had committed no offence under s. 12, sub-s. 1. In order to see whether that was a right conclusion—it was, as it purported to be, a conclusion in law—it is necessary to look at the provisions of the Act. Sect. 12, sub-s. 1, under which the information was preferred provides as follows, in the material words: "If any person over the age of sixteen years, who has the custody, charge, or care of any child or young person, wilfully . . . . neglects . . . . such child or young person, or causes or procures such child or young person to be . . . . neglected . . . . in a manner likely to cause such child or young person unnecessary suffering or injury to his health . . . . that person shall be guilty of a misdemeanour" and shall be liable on conviction to fine or imprisonment or both. Sub-s. 2 provides that "a person may be convicted of an offence under this section . . . . notwithstanding that actual suffering or injury to health, or the likelihood of such suffering or injury to health, was obviated by the action of another person." Certain things are quite obvious. It is obvious that so far as the persons referred to are concerned the section is framed in the most comprehensive terms. It relates to any person over the age of sixteen years who is in a certain relation to a child. It is obvious also that a distinction is suggested between the

custody of a child, the charge of a child and the care of a child. Further it is obvious that it is not necessary to prove before a person can be convicted of wilful neglect to a child that the neglect caused actual suffering or injury to the health of the child; it is sufficient to prove that the neglect was of a kind likely to cause suffering or injury to the health of the child. That section is to some extent amplified by s. 38, sub-s. 2, of the Act, which distinguishes different classes of persons and distinguishes between the custody, charge or care of a child. It is in these terms: "For the purposes of this Part of this Act"—which includes s. 12—"any person who is the parent or legal guardian of a child or young person or who is legally liable to maintain a child or young person shall be presumed to have the custody of the child or young person, and as between father and mother the father shall not be deemed to have ceased to have the custody of the child or young person by reason only that he has deserted, or otherwise does not reside with, the mother and child or young person." So much as to the custody of the child. The next paragraph deals with the charge of a child: "Any person to whose charge a child or young person is committed by any person who has the custody of the child or young person shall be presumed to have charge of the child or young person." Finally, "Any other person having actual possession or control of a child or young person shall be presumed to have the care of the child or young person." So that there is in the section a scale of persons in a descending degree of importance, and there is a presumption with regard to each of them. There are persons who because of their blood relationship or legal position are presumed to have the custody of a child. There are persons who have the charge of a child and are presumed to have the charge because the child has been committed to them by the person having the custody of the child. Finally there are the persons who de facto have the care of a child. Before a person can be convicted under s. 12 of the wilful neglect of a child it is necessary to show that he is a person of the kind against which s. 12 is directed and that he has committed an act

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to which s. 12 refers. The justices in this case did not go beyond the first of these two questions, and dismissed the information, because they thought that the presumption as to a parent referred to in s. 38, sub-s. 2, was rebutted by the mere existence of a separation agreement between the parties without regard at all to the way in which the terms of that agreement had or had not been carried out.

A similar question was considered in *Poole* v. *Stokes*. (1) In that case there had been a separation agreement between husband and wife, but the terms of the separation agreement were not reduced to writing. There had been neglect of the children of the marriage and the husband knew of his wife's neglect. The husband and the wife were both charged with the wilful neglect of the children, and it was held that the husband was liable to conviction under the Act notwithstanding that the children were not living with him, as the fact that he was supplying his wife with sufficient money for their maintenance did not exempt him from the obligation cast upon him by the Act to provide his children with food and clothing. Channell J. in giving judgment with which Scrutton and Bailhache JJ., the other members of the Court, agreed said this (2): "The respondent and his wife had entered into a separation agreement. There was a voluntary separation and a voluntary payment by the husband, and he had been paying her 20*s*. a week under that agreement for the maintenance of herself and her children. The justices have found in the supplemental case that this sum was sufficient, and therefore he has provided her with a sum of money and he has sent that money to her. The respondent intrusted to his wife the spending of that money, and delegated to her the duty of providing clothing and food for them. That might be satisfactory for a time, but it is clear that he became aware of the fact that his wife was not properly using the money and that she was not providing for the children, and consequently he was in the position of having employed an agent to perform his duty and of having knowledge that that agent was not performing the duty. The consequence is

(1) [1914] W. N. 123; 110 L. T. 1020. (2) 110 L. T. 1022.

that he was not doing his duty, and he has failed to do his duty. He was sending the money to his agent to do it, and that agent did not do it. He has failed to provide adequate food for the children, and therefore he is clearly liable. What he did was to go to the Society for the Prevention of Cruelty to Children and to draw their attention to the facts; but the fact that he went to the society, apparently for the purpose of protecting the children, does not relieve him from the obligation to perform his duty himself. There was nothing, as far as we can see, to prevent him from taking his children away from his wife. Sect. 12, sub-s. 1, of the Act says that a parent who is legally liable to maintain a child shall be deemed to have neglected him if he fails to provide adequate food, clothing, and so forth."

Two distinctions have been suggested in the course of the argument between that case and the present case. It is said in the first place that in that case the agreement for separation was oral, whereas in the present case the agreement for separation is in writing. That seems to me to be a matter of no moment. If a parent could by a voluntary agreement get rid of the legal presumption that he has the custody of his child it would not matter, I think, whether the agreement was oral or written. It is said in the second place that it appears from certain phrases employed by Channell J. that in the terms agreed between the parents in *Poole* v. *Stokes* (1) nothing was said about the custody of the children as distinguished from the charge or care of the children.

That distinction brings us at once to the kernel of the case. Is it possible for a parent by a voluntary agreement, whether oral or in writing, to get rid of the legal presumption that he has the custody of the child which for the purposes of this Act is created by s. 38, sub-s. 2? In dealing with that presumption one must deal also with the presumptions about persons on the second and third rungs of the ladder who are dealt with in the remaining parts of the same sub-section. In my opinion it is not possible for parents by their own act to get rid of this legal presumption. The matter was not

(1) 110 L. T. 1020.

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directly considered in *Liverpool Society for the Prevention of Cruelty to Children* v. *Jones* (1), but it appears to me that the proposition which I am now seeking to express is really involved in the latter part of Atkin J.'s judgment, where he said: "To my mind the effect of s. 38, sub-s. 2, is that the persons who are there named and who are respectively presumed to have the custody, charge, or care of the child may, if they wilfully neglect it, be convicted under s. 12 even though they have not in fact either the custody, charge, or care." I am strengthened in the view which I am expressing by reference to the Custody of Infants Act, 1873, which by s. 2 provides as follows: "No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or the control thereof to the mother: Provided always, that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto." I cannot help thinking that when one finds in s. 38, sub-s. 2, of the Act of 1908 the words "as between father and mother" of the child the Legislature was drawing a distinction between that which could be done as regulating the relationship of the individuals and that which may be done by them or either of them in subtraction or purported subtraction from the obligations with regard to their children which they owe to the community. In my opinion the justices were wrong in holding that the separation agreement rebutted the presumption created by s. 38, sub-s. 2, that the respondent had the custody of the child, as no separation agreement can rebut that presumption. There remains the question whether the respondent has been guilty of wilful neglect, and upon the consideration of that question the justices have hardly entered. The case must therefore go back to the justices for them to consider whether in fact there was wilful neglect of the child in the manner contemplated by the statute.

(1) [1914] 3 K. B. 813, 818.

DARLING J. I entirely agree and have nothing to add.

SALTER J. I am of the same opinion. Sub-s. 1 of s. 12 of the Children Act, 1908, defines three classes of persons; those having (*a*) the custody, (*b*) the charge or (*c*) the care of a child, and provides a punishment for persons of these three classes for neglect or ill-treatment of the child. Whether persons fall within one or other of these classes is a question of fact. Sect. 38, sub-s. 2, provides that certain persons shall be presumed to be in each of these classes. These are presumptions of law. I think that the person who has the custody of a child cannot be heard to say that he has not the custody of the child unless he is deprived of the custody by the order of a competent Court. A person to whom has been committed the charge of a child by the person having the custody of the child cannot be heard to deny that he has the charge of the child, and a person who has actual possession or control of a child cannot be heard to say that he has not the care of the child.

Appeal allowed. Case remitted.

Solicitors for appellant: *Church, Rackham & Co.*

Solicitors for respondent: *Indermaur & Brown, for J. C. Wilson, Kettering.*

R. F. S.

1922
Dec. 1, 11.

EDWARDS AND ANOTHER *v.* PORTER AND WIFE.

[1922. E. 410.]

Husband and Wife—Action for Money lent—False Representation by Wife that Money borrowed for Husband—Money handed over to Wife—Liability of Husband.

Money was handed over to a wife by two persons who were induced to lend the money by the wife falsely representing that she was borrowing the money not for herself but for her husband, who wanted the money for certain specified purposes. The husband, in fact, was not in want of money, knew nothing about the matter, never authorized his wife to obtain a loan for him, and did not receive any of the money. In an action against the husband and the wife to recover the money lent:—

Held, that the husband was not liable, inasmuch as false representation by a wife of authority to make a contract on behalf of her husband is not a tort in respect of which the husband can be made liable.

ACTION tried before Bailhache J.

The action was brought by the two plaintiffs against the defendants, Mr. Porter and his wife, to recover various sums of money which were handed over by the plaintiffs to Mrs. Porter.

The plaintiffs were induced to lend the money by Mrs. Porter representing that she was borrowing it not for herself but for her husband, who wanted the money to enable him to pay some rates and to do some repairs to some small property which belonged to him. Both those representations were false. The husband, in fact, was not in want of money and had no need to borrow, and he did not receive any of the money borrowed from the plaintiffs. He knew nothing about the matter and never authorized his wife to obtain a loan for him. The wife admitted that she had had the money and had spent it.

Lucien Fior for the plaintiffs. The husband is liable for the money handed over to his wife by the plaintiffs, as it was handed over by the plaintiffs upon the faith of the false representations by the wife that it was being borrowed by the husband. That representation was a tort committed by the wife for which the husband is responsible. There was no

contract in the present case induced by the fraud, as the plaintiffs did not purport to lend the money to the wife, and the husband never authorized his wife to borrow money on his behalf and never in fact received the money. The general rule of law is that a husband is liable for his wife's fraud as well as for other torts committed by her during coverture. The only exemption from that liability is in cases where the fraud is directly connected with the contract with the wife and is the means of effecting it and is parcel of the same transaction: *Liverpool Adelphi Loan Association* v. *Fairhurst.* (1) Willes J. pointed out in *Wright* v. *Leonard* (2) that that was the extreme length to which the exemption had been carried in any case and that the general rule of law ought not to be further infringed upon. In that case there was a fraudulent representation by a married woman that certain acceptances of bills of exchange were the acceptances of her husband, and the plaintiffs were induced thereby to discount them and suffered loss. They thereupon brought an action against the husband and wife. Willes and Williams JJ. held that those facts constituted a cause of action against the husband and wife and that the husband was properly joined as a defendant. Those judges thought that in the circumstances of that case the fraud did not induce the contract but came in after it and was separable from it. That decision was approved by the Court of Appeal in *Earle* v. *Kingscote.* (3) In that case the defendant's wife had entered into a contract with the plaintiff under which the plaintiff was to pay her a sum of money in a certain event and subsequently the defendant's wife induced the plaintiff to pay her the money by a false representation that the event had happened, and it was held that as the contract was not induced by the fraud and was altogether independent of it the defendant was liable in damages for his wife's fraud. Those decisions are direct authorities here where there was no contract between either the plaintiffs and the male defendant or the female defendant. If a wife contracts expressly as

(1) (1854) 9 Ex. 422.
(2) (1861) 11 C. B. (N. S.) 258, 266.
(3) [1900] 2 Ch. 585.

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agent for her husband and she has no authority in fact to do so she would be liable to an action on the implied warranty of authority, or to an action for deceit if the other party was not aware that she had no authority: see Lush on Law of Husband and Wife, 3rd ed., p. 371.

Thorn Drury K.C. and *Doughty* for the male defendant. The husband is not liable to pay this money to the plaintiffs who handed it to the wife upon her false representations. Those representations amounted to a contract or warranty by her upon which she might be sued, but they are not torts for which the husband is liable, as a husband's liability extends only to torts unconnected with contract which are committed by the wife. In the present case as the wife had the money she was clearly liable upon an implied contract for money had and received or upon an implied warranty of authority. In *Cooper* v. *Witham* (1) a married woman by fraudulently representing herself to be unmarried induced the plaintiff to marry her and it was held that an action would not be against the husband. In *Liverpool Adelphi Loan Association* v. *Fairhurst* (2) a married woman by fraudulently representing herself to be unmarried induced the plaintiff to advance a loan to a third party taking her promissory note as surety, and it was held that as the fraud was directly connected with the contract with the wife, and was the means of effecting it, and parcel of the same transaction an action could not be maintained against the husband. In the course of the argument, however, Alderson B. said (3): "It seems to me that the torts of the wife, for which the husband is to be considered as responsible, are those only which are purely torts, that is to say, such as are in no way connected with a contract." In *Wright* v. *Leonard* (4) the Court were equally divided in opinion and it was held by Erle C.J. and Byles J. that the husband was not liable. Erle C.J. said (5) that "a false representation by which credit is obtained is in its nature more fit to be classed with contracts than

(1) (1668) 1 Lev. 247.
(2) 9 Ex. 422.
(3) 9 Ex. 427.
(4) 11 C. B. (N. S.) 258.
(5) Ibid. 268.

with wrongs. It is in substance a warranty of a debt, and so a contract." Erle C.J. also referred to *Liverpool Adelphi Loan Association* v. *Fairhurst* (1) where it was held that the husband was not answerable for a false representation made by his wife in connection with a contract made by her, and said that he saw no reason for holding that the husband's exemption from responsibility for the false representation should be limited to the particular case there in question, and that he saw no reason why the addition of a breach of contract to a false representation should create the exemption. Collins L.J. pointed out in *Earle* v. *Kingscote* (2) with reference to cases where the fraud or other torts were embraced in contracts that "where you cannot separate the fraud or other tort in respect of which you are suing from the contract, you cannot, by framing your statement of claim in the shape of tort, turn that which is essentially in its main features contract into tort so as to let in the liability of the husband where the two are inextricably mixed together. You can only treat it in point of law as a contract, and not as a tort." That observation is clearly applicable in the present case.

Monier-Williams for the female defendant.

Lucien Fior replied.

Cur. adv. vult.

Dec. 11. BAILHACHE J. [after stating the facts continued :] The action so far as the married woman defendant is concerned is quite simple ; she had this money ; it was paid over to her, and she has kept it, and she must return it. That part of the case presents no difficulty. But the case is different so far as her husband is concerned. It is said that a husband is liable in damages for his wife's tort, which, generally speaking, is quite accurate. It is also said—and this, too, is accurate—that a fraudulent representation by a wife is a tort, and it is said, therefore, that this being a case of fraudulent representation, and the husband being liable for his

(1) 9 Ex. 422. (2) [1900] 2 Ch. 591.

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wife's tort, the husband is liable to pay this money, although he has had none of it.

There is one settled exception to the general rule that a husband is liable for his wife's torts, and that is this: that when the wife makes a fraudulent representation for the purpose of inducing a contract, and a contract is induced by that false representation, the husband is not liable. Sometimes it is put in another way, that a husband is only liable for what are called the naked torts of his wife. The peculiarity of this case is that this tort, although it was made in order to induce a pretended contract, did not induce a contract at all. A husband is not liable in contract at any rate upon a representation of his wife that she is his agent. But in my judgment, although no contract was in fact induced, a false representation of authority by a wife to make a contract on behalf of her husband is not a tort in respect of which the husband can be sued as being liable for his wife's torts. It is true that an action for deceit would lie against the wife in such a case. She would also be liable in an action for breach of warranty of authority. I think it is in accordance with the reasoning in the case of *Wright* v. *Leonard* (1), to hold that a husband is not liable for a fraudulent representation of his wife that she had authority to contract on his behalf. Such a decision not only follows from the reasoning in that case, but also seems to me to be right in principle. If it were not so, the wife of a man with an income of a few hundreds a year might go and buy a Rolls-Royce car, pretending that it was on his behalf. He clearly could not be sued in contract; and it would be odd if, although he could not be sued in contract, he should be made liable in damages in respect of the same transaction as being liable for the wife's breach of warranty of authority. In my judgment, it is true to say that when the tort by the wife is a fraudulent representation that she has the authority of the husband to make a contract, the husband is not liable in respect of such a tort as that.

(1) 11 C. B. (N. S.) 258.

There must be judgment, therefore, for the plaintiffs against the wife, but the action against the husband must be dismissed.

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Solicitors for plaintiffs: *C. Butcher & Simon Burns.*
Solicitors for both defendants: *Sewell, Edwards & Nevill.*

R. F. S.

McNEALL *v.* HAWES.

1922 *Dec.* 12, 13.

[1922. M. 478.]

Husband and Wife—Tort by Wife—Naked Tort—Tort connected with Contract—Liability of Husband—Measure of Damages.

A married woman lent a life insurance policy belonging to her husband, the plaintiff, to H. and fraudulently gave him a document purporting to be written by her husband, authorizing the defendant (the plaintiff by counterclaim) to hold the policy as collateral security for a loan by the defendant to H. Relying on this document the defendant advanced money to H. who did not repay it. On a claim by the husband for the return of the policy, the defendant counterclaimed against the plaintiff and his wife for damages caused by the wife's misrepresentations:—

Held, that as the wife had herself entered into no contractual relation with the defendant, her tort was a naked tort and not one connected with contract, and that, consequently, her husband was liable.

Held, also, that the measure of damages was the amount advanced on the faith of the misrepresentations and not the value of the policy.

ACTION tried by Lush J.

On October 19, 1921, one Harold Holmes requested the defendant, Frank Wallace Hawes, to lend him 87*l.* on a promissory note. The defendant required further security, and Mrs. McNeall, the wife of the plaintiff, Harry H. McNeall, at Holmes' request, lent him a life policy for 200*l.* effected by the plaintiff on his own life with the Prudential Assurance Company, for the purpose of enabling Holmes to borrow the money, and for that purpose signed and gave him the following document which had been prepared by the defendant: "To Mr. Frank Wallace Hawes. Please hold my policy for 200*l.* . . . . in the Prudential Assurance

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Co. on my life as collateral security for the promissory note 87*l.* signed by H. Holmes this day to yourself." This was signed over a sixpenny stamp with the plaintiff's name "H. H. McNeall" by the wife. She signed it without the knowledge of the husband, and as Lush J. found, fraudulently, Holmes having requested her not to tell her husband, as he would repay the loan and return the policy in a few weeks. Relying on the above document the defendant advanced the 87*l.* to Holmes, who never repaid it and eventually disappeared. On discovering what had taken place the plaintiff brought this action claiming the return of the policy. The defendant disputed his liability to return it, and in the alternative said that if he wrongfully detained the policy, he had advanced the above 87*l.* relying on the false and fraudulent statements of Mrs. McNeall and had thereby suffered damage; and he counterclaimed for damages against both the plaintiff and his wife.

No evidence of the value of the policy was given.

Merlin for the plaintiff and the defendants by counterclaim. The plaintiff is clearly entitled to the return of his policy.

The wife was not guilty of fraud. But assuming that she was, and is consequently liable in tort on the counterclaim for deceit, the husband is not liable. This is not a naked tort but one connected with a contract. The defendant is trying to frame in tort a claim for what is really the breach of a warranty of authority, or of a contract of guarantee. In every case where there has been a contract, or the pretence of a contract, in respect of which the tort was committed the husband has been held not liable: *Wright* v. *Leonard* (1) which has been followed ever since. The passing of the Married Women's Property Act, 1882, has not changed the law: *Earle* v. *Kingscote.* (2) The contract by the defendant with the wife was: "Give me authority to hold that policy and I will lend the money."

[Lush J. But he said that to Holmes, not to Mrs. McNeall.]

(1) (1861) 11 C. B. (N. S.) 258. (2) [1900] 2 Ch. 585.

The contract was made by the wife through the agency of Holmes, and on her part was an agreement to hand over the policy on condition the money was lent.

[*Le Lievre* v. *Gould* (1); *Liverpool Adelphi Loan Association* v. *Fairhurst* (2); the judgment of Fletcher Moulton L.J. in *Cuenod* v. *Leslie* (3); and *Cole* v. *De Trafford* (4) were also referred to.]

This case is covered by the decision of Bailhache J. in *Edwards* v. *Porter* (5) where a wife borrowed money by falsely representing that she was borrowing it for her husband. The husband was held not liable in an action against him and his wife in tort.

Viscount Erleigh for the defendant and plaintiff by counterclaim. This is a naked tort unconnected with contract. The wife entered into no contractual relation at all. The test is whether the defendant could have sued her. There was no privity between them.

The proper measure of damages is the amount of the money lent—namely, 87*l.*, which the defendant says he would not have advanced but for the misrepresentations.

Merlin. The measure of damages is the value of the policy, no evidence of which has been given. Otherwise the defendant gets more than he would if the policy was left in his hands.

Lush J. This case raises an important and interesting question. The facts are shortly these. A man named Holmes, who was a personal friend of the plaintiff Mr. McNeall and his wife, was in financial difficulties. He frequently used to visit the McNeall's house, where they carried on a restaurant business. He asked Mrs. McNeall if she could lend him some money, saying that he would be able to repay it very shortly. Mrs. McNeall replied that she was not in a position to lend money, but that she had a security upon which he might borrow money, and that she was

(1) [1893] 1 Q. B. 491.
(2) (1854) 9 Ex. 422.
(3) [1909] 1 K. B. 880, 888-9.
(4) [1917] 1 K. B. 911.
(5) (1922) 39 Times L. R. 124; since reported, ante p. 268.

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willing to lend it for that purpose. She brought him an envelope which contained among other documents a security belonging to her and a life insurance policy belonging to her husband. Mrs. McNeall, being as she said very busy at the time, handed the envelope to Holmes, telling him to open it, take out her security, and hand her back the other documents. Shortly afterwards Holmes brought back the envelope telling Mrs. McNeall that he could not raise money on her security but that he had kept the husband's policy for the purpose of raising money on it. She said he had no right to do anything of the kind, but he kept it, promising to give it her back in a week or two, and begged her not to tell her husband, a request which she complied with.

Holmes, who seems to be a plausible person, took the policy to the defendant, and asked him if he would lend him money on the security of the document, which he said belonged to his brother-in-law. Mr. McNeall was not, in fact, his brother-in-law. The defendant, not unnaturally, wanted to be assured that the deposit of the policy was authorized by Mr. McNeall. Holmes accordingly went to Mrs. McNeall and took with him a stamped paper which had been prepared by the defendant. Above the stamp these words were were written: "To Mr. F. W. Hawes. Please hold my policy for 200*l*. . . . . in the Prudential Insurance Co. on my life as collateral security for the promissory note 87*l*. signed by H. Holmes this day to yourself." Holmes produced this to Mrs. McNeall, and asked her to write her husband's name across the stamp. Mrs. McNeall, who stated in evidence that she was very busy on this occasion also, wrote her husband's name across the stamp. She had no authority to do this, and did not tell her husband that she had done it. She did it in order to benefit Holmes, expecting that he would repay the loan to the defendant in a week or two and give her back the policy. She said she did not know what was written on the paper and that she had no intention of deceiving anybody. Holmes took the paper so signed to the defendant, who, believing that it was a genuine document and that the owner of the policy assented to its deposit,

advanced 87*l.* to Holmes. Holmes did not repay the money and eventually disappeared. The plaintiff, Mr. McNeall, ascertained two or three months later what had been done with his policy, and applied to the defendant for its return. The defendant refused to return it. The plaintiff brought this action to recover it, and the defendant while not admitting his right to it, counterclaimed for damages against Mr. and Mrs. McNeall for the false and fraudulent representation by Mrs. McNeall that her husband had signed or authorized the signing of the document and had assented to the giving of the security.

The first question I have to decide is whether the defendant has any defence to his claim for the recovery of the policy, and it is quite plain that he has none.

Then comes the question raised by the counterclaim, whether the defendant has any cause of action for damages against Mr. and Mrs. McNeall.

It is not disputed that he has one against Mrs. McNeall; the controversy has arisen over his claim against her husband. In order to see whether he has a claim against him I have first to say whether the wife was guilty of fraud, so that an action of deceit would lie against her at the suit of the defendant. I cannot accept the contention that she acted in good faith although carelessly. I am satisfied that she knew what the purpose of the document was and what was written on it and that she was guilty of fraud. I do not know that it is necessary for me to say that she actually intended to defraud. She certainly can be sued in an action of deceit. In *Foster* v. *Charles* (1), where a similar contention was set up, the Court held that, even though no actual intention to defraud is established, the making of a statement which is untrue and known to be untrue by the person making it gives rise to an action of deceit, and that it is unnecessary to attribute any particular motive to such person. Tindal C.J. said (2): "The law will infer an improper motive if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff."

(1) (1830) 6 Bing. 396. (2) Ibid. 403.

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The question then arises whether in these circumstances the plaintiff, Mr. McNeall, is liable to be sued with his wife for her deceit. The law for a long time has been stated to be this. I am referring to the time antecedent to the Married Women's Property Act, 1882, which for the first time enabled a married woman to contract in her own name and to sue and be sued in her own name, without her husband being joined. If the tort committed by a married woman was a naked tort, unconnected with a contract, such as the publication of a libel or an assault, she was at common law liable for the consequences, but she could not be sued alone; in order to make an action against her effective a plaintiff had to make her husband a party. It was not true to say that the husband was liable simpliciter for his wife's tort, but the result was the same if the case went to judgment during the coverture, for the judgment went against both and the husband had to pay the damages. On the other hand, as a married woman could not at common law enter into a contract, it was held, in order to discourage persons from entering into contracts with a married woman, that if she committed a fraud in the course of the negotiations for what would have been a contract if she had the power of contracting, the person who had been cheated by her into making the contract was not allowed to disregard the contract and sue her and her husband for the tort she had committed, thereby indirectly getting the benefit of the contract. If she entered into what would have been a contract if she was unmarried she and her husband could not be sued in tort. The law was the same in the case of an infant. If an infant fraudulently pretended he was of full age, the law did not allow the person cheated to sue him for the fraud. Otherwise the infant would indirectly get the same benefit as he would if he was able to make a contract.

Although under the Married Women's Property Act, 1882, a married woman can be sued alone in tort, the position is the same as it was at common law.

It has been held by the Court of Appeal (1) following and

(1) In *Earle* v. *Kingscote* [1900] 2 Ch. 585.

approving the decision of the Divisional Court in *Seroka* v. *Kattenburg* (1), that the liability of a husband to be joined in an action against his wife for a tort still exists, notwithstanding that the obligation to join him on which alone it was founded has been removed by the Act. Fletcher Moulton L.J. disagreed with this view in *Cuenod* v. *Leslie.* (2) The position, if that is what the Act contemplated, is certainly anomalous. A wife may have more money than her husband, but he may have to pay damages for her torts, and he has no power under the Act to claim repayment from her. The law however is as I have stated, and therefore the question I have to decide is whether the fraud of Mrs. McNeall was a naked tort or was a fraud connected with a contract within the meaning of the above principle. There are many illustrations in the reports of the application of the principle. When a married woman, pretending to be unmarried, agreed to marry and went through the form of marriage with the plaintiff, it was held that she and her husband could not be sued for fraud. (3) Again, when a married woman by a similar fraud induced the plaintiff to lend money to a third person, she becoming surety for the debt, the same conclusion followed. (4) The case of *Wright* v. *Leonard* (5), which was relied on by Mr. Merlin for the plaintiff as an authority in his favour, was a somewhat peculiar one. In that case the plaintiff was asked by one Salt to discount certain acceptances which purported to be those of the male defendant. The female defendant, his wife, fraudulently stated to the plaintiff that the acceptances were those of her husband, although in fact, as she knew, he had not accepted them, and on the faith of that fraudulent representation the plaintiff discounted the bills. He afterwards found out that he had been deceived and brought an action against the wife and her husband for damages for her tort. The case came before the Court on demurrer and the question was whether

(1) (1886) 17 Q. B. D. 177.
(2) [1909] 1 K. B. 880, 888.
(3) *Cooper* v. *Witham* (1668) 1 Lev. 247.
(4) *Liverpool Adelphi Loan Assn.* v. *Fairhurst* 9 Ex. 422.
(5) 11 C. B. (N. S.) 258.

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the declaration disclosed a cause of action. The Court consisted of four judges. All the members of the Court were agreed as to the principle I have stated; the only question was whether the declaration disclosed what I have called a naked tort or a tort connected with a contract. On this question the Court was equally divided. Erle C.J. and Byles J. took the latter view, holding that a cause of action against the wife for breach of warranty of authority was sufficiently disclosed, and consequently held that the action would not lie against the husband. Willes and Williams JJ. took the opposite view and held that the fraud was not connected with a contract, the wife not having entered into any contractual relation, express or implied, with the plaintiff. Williams J. withdrew his judgment but no further proceedings appear to have been taken. The question was left undecided. Now I have to say whether upon the facts as proved in the present case it would be possible for the defendant to bring an action in contract against Mrs. McNeall. I think that the error of Mr. Merlin, who has ably argued this case for the plaintiff, consists in an assumption that if the fraud of the wife was connected with any contract at all it is sufficient to prevent the action being brought. That is a misapprehension. What I have to see is whether the wife made any contract herself, express or implied. If she did no action lies against the husband; if she did not an action will lie. It is immaterial that the defendant made a contract with a third person, Holmes. What contract did the defendant make with Mrs. McNeall? He made none. He never contracted with or gave credit to a married woman at all. Mrs. McNeall never purported to contract with him. All she did was to put her husband's name to a document which was nothing more than an assent to the defendant holding the policy and give it to Holmes to raise money on it. She did not become a guarantor of the debt, or enter into any personal liability, or give a warranty to the plaintiff. She certainly did not as between herself and Holmes; he knew perfectly well that she had no authority. That being so this was a naked tort for which an action of deceit can be brought, and the husband and wife are

properly made defendants. I was asked to say that this case is identical with *Edwards* v. *Porter* (1) decided by Bailhache J. a few days ago. I think that the judgment in that case, with which I entirely agree, does not affect this case at all. Bailhache J. was dealing with a fraudulent representation made by the wife to the plaintiff that she had her husband's authority to borrow money on his behalf. The loan was made on the faith of that representation. That being so it is obvious that on the doctrine of *Collen* v. *Wright* (2) she was impliedly warranting that she had her husband's authority. The plaintiff could have sued her on her implied warranty and he could not therefore sue her and her husband in tort. Therefore that case does not help me. The defendant must have judgment against both Mr. and Mrs. McNeall.

With regard to the damages, the defendant is entitled to be recouped the loss sustained by reason of the fraudulent representations. The evidence is that he would not have parted with 87*l.* but for these representations; it follows that the loss is 87*l.* I therefore give judgment for the plaintiff on the claim and for the defendant for 87*l.* on the counterclaim.

Judgment accordingly.

Solicitors for plaintiff: *Crosse & Sons.*
Solicitors for defendants: *Fladgate & Co.*

(1) 39 Times L. R. 124; ante p. 268. (2) (1857) 8 E. & B. 647.

W. L. L. B.

Considered. PEARSON v. ROSE & YOUNG LD. [1951] 1 K. B. 275

C. A.
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Oct. 25, 26; *Nov.* 9.

[IN THE COURT OF APPEAL.]

FOLKES *v.* KING.

[1921. F. 2481.]

Factor—Mercantile Agent—Possession of Goods—Consent of Owner—Larceny by a Trick—Power to pass Property—Bona fide Purchaser—Factors Act, 1889 (52 *&* 53 *Vict. c.* 45), *s.* 2.

The owner of a motor car delivered it to a mercantile agent for sale. The owner stipulated and the agent agreed that the car should not be sold at less than a specified price without the owner's permission. The agent intended from the beginning to sell the car immediately for the best price he could get and to use the proceeds for his own purposes. On the day on which he got the car he sold it for less than the specified price to a purchaser who bought it in good faith and without notice of the agent's fraud. The agent misappropriated the proceeds. The car was subsequently purchased by the defendant.

In an action of detinue by the owner of the car against the defendant:—

Held, by Bankes and Scrutton L.JJ. and Eve J.:—

(1.) That the defendant acquired a good title by virtue of s. 2 of the Factors Act, 1889;

(2.) that the mercantile agent had not rendered himself liable to be convicted of larceny by a trick, inasmuch as he was authorized by the plaintiff to pass the property in the car to a purchaser.

Held, by Bankes and Scrutton L.JJ., that as the plaintiff in fact consented to the mercantile agent having possession of the car, it was immaterial whether the latter committed larceny by a trick.

Oppenheimer v. *Frazer* [1907] 2 K. B. 50; *Whitehorn* v. *Davison* [1911] 1 K. B. 463, and dictum of Collins L.J. in *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* [1899] 1 Q. B. 643, 659 considered and discussed.

Judgment of Greer J. [1922] 2 K. B. 348 reversed.

APPEAL from the judgment of Greer J. (1)

The plaintiff was the owner of an Austin touring motor car. He entrusted it for sale to a man named Hudson who with a partner named Scott carried on business in Cranbourn Street, London, as a mercantile agent for the sale of cars. The terms on which the car was entrusted to Hudson were contained in a letter written by him to the plaintiff and dated March 14, 1921. The letter was as follows: "Dear Sir, I hereby acknowledge receipt of your 20 Austin car and

(1) [1922] 2 K. B. 348.

this acknowledgment brings you under my floating insurance policy. I hereby agree that your Austin touring car will not be disposed of under 575*l.* without your permission. Any offer received below this sum will be submitted to you by wire for your acceptance or refusal. Assuring you of my prompt and courteous attention," etc. Hudson's principal business was that of selling cars on commission, his general practice being to sell at a fixed commission of 10*l.* on each car whatever the value of the car might be. By March, 1921, he had got into financial difficulties and had been using for his own purposes money which belonged either to himself and his partner jointly or to their customers. In order to keep the business going he adopted the plan of getting cars from customers upon a promise to sell them at the price named by the customer, but with the intention of selling them at the best price he could get and then using the money to make good his defalcations and for other purposes of his own. He had acted in this way on at least fifty occasions, no doubt in the hope of getting funds from time to time to enable him to pretend to customers that he had sold their cars at prices not less than those named by them and to pay over sums of money accordingly.

On getting the plaintiff's car Hudson immediately sold it to one Benjamin Alvarez, a motor-car dealer in the Euston Road, for 340*l.* Hudson paid the price into his own banking account out of which he was paying to customers what purported to be the price of their cars, and he credited his firm with the 10*l.* commission. Alvarez, who purchased the car in good faith, and without notice of Hudson's want of authority, sold it to one Simons for 390*l.*; Simons sold it to one Harris, and on April 13, 1921, Harris sold it to the defendant for 500*l.*

On December 1, 1921, the plaintiff brought an action against the defendant claiming the return of the car or its value and damages for its detention. Greer J. found that Hudson never intended to carry out the instructions of the plaintiff; that when the car was delivered to him on the terms mentioned he intended to sell it to Alvarez at the best

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price he could get and to use the proceeds for his own purposes; that he got possession of the car intending to use it for his own purposes, and that he had throughout the intention of defrauding the plaintiff. He held that Hudson had committed larceny of the car by a trick, and that consequently he never was in possession of the car with the consent of the owner within the meaning of s. 2 of the Factors Act, 1889 (1), and could pass to a purchaser no better title than he had himself. The learned judge therefore gave judgment for the plaintiff for the return of the car, or for 400*l.* its value.

The defendant appealed.

Schiller K.C. and *Hilbery* for the appellant. The learned judge has applied to the solution of this question a fallacious test, which has led him to the wrong conclusion. He has reasoned thus: Hudson committed larceny of the car by a trick; therefore he was never in possession of the car with the consent of the owner. The conclusion does not follow from the premiss. Larceny by a trick may be committed in two ways: First where the owner does not intend to part with possession to the thief; for example, where the thief represents himself to be some one else so that he and the owner are not ad idem regarding the person to whom

(1) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 1, sub-s. 1: "The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods."

Sub-s. 2: "A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf."

Sect. 2, sub-s. 1: "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

possession is supposed to be delivered, in which case the transfer of possession is not merely voidable, but void: cf. *Kingsford* v. *Merry* (1); *Hardman* v. *Booth* (2); *Cundy* v. *Lindsay* (3); or, for another example, if the thief should contrive to get possession of the goods in question by deceiving the owner into thinking he was delivering other goods, so that the parties were not ad idem respecting the subject matter of the transaction, as in *Raffles* v. *Wichelhaus* (4), in which case again the transfer of possession is void. Secondly, there may be larceny by a trick where the owner intentionally parts with possession of the goods to the thief, being induced to do so by a fraudulent misrepresentation not affecting the identity of the thief or of the goods, the owner intending to pass possession only and not the property in the goods and the thief intending to appropriate the property: *Reg.* v. *Buckmaster* (5); *Reg.* v. *Russett.* (6) In this second class of cases there is the owner's consent in fact to the possession of the thief and that consent is not annulled by the fact that it was obtained by fraud: *Sheppard* v. *Union Bank of London* (7); *Cole* v. *North Western Bank.* (8) If the plaintiffs in *Baines* v. *Swainson* (9) had known what was in the mind of the factor and commission agent they would never have entrusted him with the goods, but this did not prevent him from passing a good title to the defendants. In *Vickers* v. *Hertz* (10) Campbell Brothers, the agents for sale, obtained a delivery order from Vickers by falsely representing that they had found a purchaser for his goods; they then pledged the goods to Hertz and it was held that Hertz got a good title under the Factors Act, 1842, Campbell Brothers being agents entrusted with the document of title notwithstanding that they had obtained it by fraud. Where consent exists in fact it is no answer to a purchaser who claims a title through s. 2 of the Factors Act, 1889, to say that the consent was

(1) (1856) 1 H. & N. 503.
(2) (1863) 1 H. & C. 803.
(3) (1878) 3 App. Cas. 459.
(4) (1864) 2 H. & C. 906.
(5) (1887) 20 Q. B. D. 182.
(6) [1892] 2 Q. B. 312.
(7) (1862) 7 H. & N. 661.
(8) (1875) L. R. 10 C. P. 354, 373.
(9) (1863) 4 B. & S. 270.
(10) (1871) L. R. 2 H. L. Sc. 113.

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obtained by fraud: *Oppenheimer* v. *Attenborough & Son* (1) per Channell J. The argument for the defendants in *Oppenheimer* v. *Frazer* (2) in the Court of Appeal is convincing and ought to prevail. In short where a defendant claims a title through a mercantile agent who was in possession of goods with the consent of the plaintiff, the owner of the goods, the defendant's title is not defeated by merely showing that the mercantile agent obtained possession of the goods by a fraud which would render him guilty of larceny by a trick. In the words of Channell J.: "It is the nature of the trick, and not the fact that it does or does not amount to larceny, which governs the question." (3) If the trick is such that the owner of the goods never consented to the mercantile agent having possession of the goods, then the purchaser from the agent gets no protection from s. 2 of the Factors Act, 1889: *Cahn* v. *Pockett's Steam Packet Co.* (4) There was no trick of that kind here. The plaintiff intended to give Hudson possession of the car and was under no mistake as to Hudson's identity.

Secondly, the learned judge was wrong in holding that Hudson committed larceny of the second kind: *Whitehorn* v. *Davison.* (5) The plaintiff delivered the car to Hudson with the intention that Hudson should pass the property to a purchaser. No definition that has yet been offered of larceny by a trick—see *Reg.* v. *Buckmaster* (6); *Oppenheimer* v. *Frazer* (7), per Fletcher Moulton L.J.; *Whitehorn* v. *Davison* (8), per Buckley L.J.; Stephen's Digest of the Criminal Law (9); Pollock and Wright on Possession in the Common Law (10)—would include this case. Furthermore, Hudson had every intention of performing the plaintiff's mandate if a purchaser had come forward ready to give 575*l.* for the car.

Charles K.C. and *Tristram Beresford* for the respondent. The question in this case is, was Hudson when he sold the

(1) [1907] 1 K. B. 510, 516.
(2) [1907] 2 K. B. 50, 54.
(3) [1907] 1 K. B. 528.
(4) [1899] 1 Q. B. 643.
(5) [1911] 1 K. B. 463.
(6) 20 Q. B. D. 182, 187.
(7) [1907] 2 K. B. 72, 73.
(8) [1911] 1 K. B. 479.
(9) Art. 324; 5th ed. (1894), p. 259.
(10) Pp. 218, 219.

car to Alvarez in possession of the car with the consent of the respondent within the meaning of s. 2 of the Factors Act, 1889? Consent for the purposes of that section must be what amounts to consent in the eye of the law: *Oppenheimer* v. *Frazer* (1), per Fletcher Moulton L.J., citing with approval the judgment of Collins L.J. in *Cahn* v. *Pockett's Steam Packet Co.* (2) There can be no consent where one party intends to entrust and the other party intends to steal. In Pollock and Wright on Possession in Common Law it is stated (3): "If a person obtains possession of a thing under colour of a treaty for the transfer of possession but really meaning to assume the property in (i.e. to steal) the thing, the nominal consent goes for nothing and the acquisition of the possession is a taking and (animus furandi being present) a theft, for there is no agreement ad idem and the accused takes 'of his own head' and not under the bailment." So if there be a bailment and the bailee repudiates the trust on which possession was delivered to him, the right to possession revests in the bailor. This is the principle on which *Reg.* v. *Buckmaster* (4) and *Reg.* v. *Russett* (5) were decided and they are supported by a great weight of authority. "Where the property is obtained with a preconcerted design to steal it, the possession is supposed to continue with the true owner whatever may be the means or the pretence under which the property is obtained": Hawkins' Pleas of the Crown (6); *Rex* v. *Sharpless* (7); *Rex* v. *Pear* (8); *Rex* v. *Semple* (9); *Reg.* v. *Janson.* (10) It was not necessary in *Whitehorn* v. *Davison* (11) to determine the particular offence of which Bruford was guilty, because the plaintiffs, after he had obtained possession of the goods, sold them to him and took bills of exchange in payment. That case cannot impair the authority of *Oppenheimer* v. *Frazer* (12), which

(1) [1907] 2 K. B. 70.
(2) [1899] 1 Q. B. 643.
(3) P. 218.
(4) 20 Q. B. D. 182.
(5) [1892] 2 Q. B. 312.
(6) Vol. i., Leach's ed., p. 210; Curwood's ed., p. 145.
(7) (1772) 1 Leach, C. C. 92.
(8) (1779) 1 Leach, C. C. 212.
(9) (1786) 1 Leach. C. C. 420.
(10) (1849) 4 Cox, C. C. 82.
(11) [1911] 1 K. B. 463.
(12) [1907] 2 K. B. 50.

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is a decision of this Court in favour of the respondents here.

[*Reg.* v. *Ashwell* (1) and *Reg.* v. *Flowers* (2) were also cited.]

Schiller K.C. in reply. *Oppenheimer* v. *Frazer* (3) is based on the judgment of Collins L.J. in *Cahn* v. *Pockett's Steam Packet Co.* (4) The question in that case arose under s. 25, sub-s. 2, of the Sale of Goods Act, 1893, which provides that "where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person . . . . of the goods or documents of title, under any sale . . . . or other disposition thereof . . . . shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner." The crucial question in the case was, as Collins L.J. says at the outset of his judgment, "whether Pintscher, the buyer, obtained possession of the bill of lading with the consent of Steinmann & Co., the sellers." He goes on to say that if a mercantile agent, or one of the persons whose disposition is made as effectual as that of a mercantile agent—in other words a purchaser—has obtained possession by the consent of the true owner, even though it were under a contract voidable as fraudulent, he is able to pass a good title to a bona fide purchaser. The Lord Justice continues (5): "However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick, and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser. See the distinction between possession obtained by a trick and possession under a contract voidable for fraud noted by Blackburn J. in *Cole* v. *North Western Bank.*" (6) When that passage in the judgment of Blackburn J. is referred to, it is quite plain from his reference to

(1) (1885) 16 Q. B. D. 190.
(2) (1886) 16 Q. B. D. 643.
(3) [1907] 2 K. B. 72, 73.
(4) [1899] 1 Q. B. 643, 657.
(5) [1899] 1 Q. B. 659.
(6) L. R. 10 C. P. 354, 373.

Kingsford v. *Merry* (1) and *Hardman* v. *Booth* (2) on the one hand and *Sheppard* v. *Union Bank of London* (3) and *Baines* v. *Swainson* (4) on the other, that the trick to which Blackburn J., and consequently Collins L.J., was referring was a trick of the first kind mentioned above—namely, one whereby the transfer of possession is not merely voidable but void.

Cur. adv. vult.

Nov. 9. The following written judgments were delivered :—

BANKES L.J. This appeal raises what Greer J. justly described as a difficult question as to the effect to be given to s. 2 of the Factors Act, 1889. The action is brought in detinue for the return of a motor car, or for its value, and for damages for detention. The claim is resisted upon the ground that a title to the car had been obtained by the defendant through a person acting in good faith and without notice who had purchased it from a mercantile agent when acting in the ordinary course of his business, the mercantile agent having obtained possession of the car with the consent of the plaintiff. To this it was replied that possession was not obtained with the plaintiff's consent. Upon this last contention the whole case turns.

The facts are not in dispute. The plaintiff was at one time the true owner of the car. He entrusted it for sale to a man named Hudson who with a partner carried on business as a mercantile agent in the selling of cars. The terms upon which the car was entrusted to Hudson for sale appear in his letter to the plaintiff dated March 14, 1921, in which he says : "Dear Sir, I hereby acknowledge receipt of your 20 Austin Car and this acknowledgment brings you under my floating insurance policy. I hereby agree that your Austin touring car will not be disposed of under 575*l.* without your permission. Any offer received below this sum will be submitted to you by wire for your acceptance or refusal. Assuring you of my prompt and courteous attention." The

(1) 1 H. & N. 503.
(2) 1 H. & C. 803.
(3) 7 H. & N. 661.
(4) 4 B. & S. 270.

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same day that Hudson received the car he sold it in fraud of the plaintiff at a much less than the authorized price to a purchaser who purchased it in good faith and without any notice of want of authority on the part of Hudson. Hudson pocketed the purchase money. The defendant purchased from a sub-purchaser from Hudson, and relied on the title of the purchaser from Hudson in defence of the claim. Greer J. held that Hudson acted throughout, and from the very initiation of his negotiation with the plaintiff, with the intention of defrauding the plaintiff, that his conduct amounted in law to larceny by a trick, and that the fact that he had stolen the car took the case out of the protection of the Factors Act, upon the ground that under the above circumstances there was no consent by the true owner to Hudson's being in possession of the car.

It was not disputed that if the true inference in law from Hudson's conduct was, either that he had obtained the car by false pretences, or had been guilty of the statutory crime of stealing it as a bailee, the plaintiff must fail, because in either of those cases it could not successfully be contended that he had not obtained possession of the car with the consent of the true owner. The plaintiff's case therefore hinged upon the narrow and technical distinction between the three classes of offence—namely, larceny by a trick, larceny as a bailee, and obtaining goods by false pretences. Our attention has been called to a number of cases in which the question for decision was whether a conviction for larceny by a trick could be supported. All these are cases in which an attempt was being made to quash a conviction on a technical ground, though no doubt whatever existed as to the moral guilt of the accused. I agree with the observation of the President in *Oppenheimer* v. *Frazer* (1) that these decisions are conflicting and difficult to understand, and that in many of them the accused was possibly held guilty of larceny on facts as to which there might be some doubt whether they amounted to larceny or not. Be that as it may, each case of this class depends upon its own particular facts,

(1) [1907] 2 K. B. 50, 66.

and upon the inferences to be drawn from those facts; and for reasons which I will indicate later I do not think that it is material to discuss them. The plaintiff in the present case however bases his claim upon the suggestion that Hudson's conduct amounted to simple larceny. It is necessary therefore to ascertain the principle upon which the distinction between the three offences of larceny, obtaining goods by false pretences, and larceny as a bailee rests. There is no doubt as to what the principle is. We were referred to *Semple's Case* (1), where the Court laid down the law in these terms: "It is now settled, that the question of intention is for the consideration of the jury; and in the present case, if they should be of opinion that the original hiring of the chaise was felonious, it will fall precisely within the principle of *Pear's Case* (2), and the other decisions which the judges have made upon the subject of constructive felony. If there was a bona fide hiring of the chaise, to pay so much for every day for the use of it, and a real intention of returning it, a subsequent conversion of it cannot be felony, whether the time for which it was hired be limited or indefinite; for by the bona fide contract, and subsequent delivery, the prisoner would have acquired the lawful possession of it; and therefore, although he afterwards abused that trust and that possession, felony could not ensue, because the original taking was lawful. But, on the other hand, if the hiring was only a pretence made use of to get the chaise out of the possession of the owner without any intention to restore it or to pay for it, in that case, the law supposes the possession still to reside with the owner, though the property itself is gone out of his hands, and then the subsequent conversion will be a felony. The case of *Rex* v. *Pear* (2) was very solemnly debated at Lord Chief Justice De Grey's house; and the unanimous opinion of the judges was at last, That the direction given to the jury by the learned judge who tried the prisoner was right. The most important part of the argument turned upon the consideration, whether the delivery of the horse to Pear had in law divested the owner either

(1) 1 Leach, C. C. 420, 422. (2) 1 Leach, C. C. 212.

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of his property or the possession of it? The question left with the jury was, whether the contract was meant fairly? or, whether it was a mere colour and pretence? The jury found that it was a mere colour and pretence; and upon that finding, the judges determined the taking to be felony; because it is an established principle of law, that the possession of property cannot be obtained through the medium of a fraud." A. L. Smith J. in two cases states the rule of law in very clear terms. In *Reg.* v. *Ashwell* (1) he says: "To constitute the crime of larceny at common law, in my judgment there must be a taking and carrying away of a chattel against the will of the owner, and at the time of such taking there must exist a felonious intent in the mind of the taker. If one or both of the above elements be absent there cannot be larceny at common law. The taking must be under such circumstances as would sustain an action of trespass. If there be a bailment or delivery of the chattel by the owner, inasmuch as, among other reasons, trespass will not lie, it is not larceny at common law. In Hawkins' Pleas of the Crown (2) it is stated: 'It is to be observed, that all felony includes trespass; and that every indictment of larceny must have the words felonice cepit, as well as asportavit; from whence it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away.'" And again in *Reg.* v. *Russett* (3) he says: "The question is whether the prisoner has been guilty of the offence of larceny by a trick or that of obtaining money by false pretences; it has been contended on his behalf that he could only have been convicted on an indictment charging the latter offence; but I cannot agree with that contention. The difference between the two offences is this: if possession only of money or goods is given, and the property is not intended to pass, that may be larceny by a trick; the reason being that there is a taking of the chattel by the thief against the will of the owner; but if possession is given and it is intended by the owner that

(1) 16 Q. B. D. 190, 195.
(2) Vol. i., Leach's ed., p. 208; Curwood's ed., p. 142.
(3) [1892] 2 Q. B. 312, 316.

the property shall also pass, that is not larceny by a trick, but may be false pretences, because in that case there is no taking, but a handing over of the chattel by the owner." There is also the passage in the same case in the judgment of Lord Coleridge C.J. (1) which is cited and relied on by Greer J.

The first question in the present case, therefore, resolves itself into the question whether under the circumstances the plaintiff did intend to pass the property in the car to Hudson or to give him the necessary authority to pass the property in it to a purchaser. If he did then Hudson could not have been convicted of larceny of the car and the plaintiff must fail in his action. The same question which has to be decided here was discussed in *Whitehorn's Case* (2), where the jury found that Bruford, who obtained the necklace from the plaintiff on the terms of the approbation note, obtained possession of it by fraud with the intention of stealing it. The Court decided the appeal upon another ground, but all the members of the Court expressed their opinion quite clearly that under the circumstances of that case Bruford could not have been found guilty of larceny by a trick. I cannot distinguish the facts of that case from the facts of the present case. For the purpose of raising this point they appear to me to be identical. We are not, I think, bound by the opinions expressed, as they are no doubt obiter, and we must in the present appeal come to a conclusion as to whether they are well founded or not. In my opinion they are well founded, and the result of adopting them appears to me to fit in better with the policy of the law on which s. 2 of the Factors Act is founded than the opposite view which was the one accepted by Greer J. in the Court below. I desire to cite a passage from each of the judgments in which I entirely concur. Vaughan Williams L.J. said (3): "This case, as I have already said, is not one of merely obtaining possession by a trick, but one in which the plaintiffs gave possession of the necklace under such circumstances

(1) [1892] 2 Q. B. 314. (2) [1911] 1 K. B. 463.
(3) [1911] 1 K. B. 475.

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that they must have intended that it should be exhibited to a customer of Bruford, and that he should have the power, if he chose, of accepting the article which was delivered to him on sale or return, and of transferring the property therein to a purchaser." Buckley L.J. said (1): "I think there is larceny by a trick where the owner of goods, being induced thereto by a trick, voluntarily parts with the possession of the goods, but does not intend to pass the property in them, and the recipient has the animus furandi; and the same is true where the owner of the goods does not intend to pass the property in them to the particular person with whom he is dealing, and has been deceived by that person as regards the identity of the person with whom he is dealing. That was the case in *Cundy* v. *Lindsay*. (2) On the other hand, goods are obtained by false pretences where the owner of the goods, being induced thereto by a trick, voluntarily parts with the possession of the goods, and does intend to pass the property. The question which is material under the circumstances of the present case is this. Suppose the facts are that the owner of the goods, being induced thereto by a trick, intends, not to pass the property in them, but to confer on the person to whom he gives possession a power to pass the property; under which head does that case fall? Prima facie it would look, inasmuch as he does not intend presently to pass the property, as if that would be larceny by a trick. I think, however, that is not so. It seems to me that, where the owner of the goods intends to confer a power to pass the property, it is a case of obtaining goods by false pretences. It is, I think, obtaining goods by false pretences where the owner, being induced thereto by a trick, voluntarily parts with the possession, and either intends to pass the property, or intends to confer a power to pass the property. If he gives, and intends to give, that power, and the power is exercised, the person who takes under the execution of the power obtains the property, not against, but by the authority of, the original owner, and none the less because the authority was obtained

(1) [1911] 1 K. B. 479. (2) 3 App. Cas. 459.

by fraud." Kennedy L.J. said (1): "I do not think that a case such as this, where, even on the plaintiff's view, there was a bailment and delivery, and not that alone, but a bailment and delivery for the purpose of the person to whom the article was delivered himself exercising a disposing power over the property, can be properly described for the purposes of such an action as the present as larceny by a trick, resulting in a void, and not a merely voidable, contract. It was intended by the plaintiffs that Bruford should sell himself, as is shown by many passages in the evidence for the plaintiffs. It seems to me impossible to say that this is a case in which there is no contract at all beyond a mere bailment: it was not a case of a mere bailment; not only was the possession parted with, but a right was also given to the bailee to confer the property in the article on a third person. I think, as I gather Channell J. thought, that where you have a case like *Hardman* v. *Booth* (2) or *Cundy* v. *Lindsay* (3), i.e., a case where, though there may be an apparent contract, there is no real contract as the result of the transaction, because there is no person with whom a contract is really made by the seller at all, in such a case the mere bailment of the goods with the consent of the owner does not prevent the transaction from being larceny by a trick; but, when the facts are such as I have described them in the present case, I think that there is no evidence to support a finding by the jury that there was larceny by a trick." I desire also to refer to what Channell J. said in *Oppenheimer* v. *Frazer* (4): "It seems to me that the true rule is that where there is a consent of the owner of the goods to the possession of the goods by the mercantile agent as a mercantile agent—and that is the important part of the matter—that then the statute applies, provided the other conditions are fulfilled; but there may be such a trick as would prevent there being any consent of the owner to the particular man having them as a mercantile agent. The facts in *Kingsford* v. *Merry* (5) and *Hardman* v. *Booth* (2), if they

(1) [1911] 1 K. B. 485.
(2) 1 H. & C. 803.
(3) 3 App. Cas. 459.
(4) [1907] 1 K. B. 519, 527.
(5) 1 H. & N. 503.

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applied, might do so; but here there is nothing but a fraud, and a fraud of exactly the same character as took place in *Baines* v. *Swainson.* (1) There the man represented to one firm that he was acting for another firm who proposed to buy the goods, whereas that firm had given him no authority and had been in no communication with him, exactly as was the case here." The above-quoted passages appear to me to contain correct statements of the law. It follows, therefore, that the plaintiff fails in establishing the larceny of the car by Hudson, with the result that his claim in the present action fails also. Attention was called, both in the Court below and in this Court, to the divergent views upon points which have been argued before us, of the members of the Court which decided *Oppenheimer* v. *Frazer* (2) and of those who decided *Whitehorn* v. *Davison.* (3) To some extent only is it true to say that those views differed. Kennedy L.J. was a member of both Courts. Upon the question which I have just dealt with the President and Kennedy L.J. in their judgments in the first of those two cases appear to me to express considerable sympathy with the view that upon the facts in that case a conclusion that larceny had been proved was not justified. Fletcher Moulton L.J. no doubt took a different view. The difference of opinion upon this point is, however, at most only a difference as to the proper inference to be drawn from the facts.

Upon the second point which was argued before us, no opinion was expressed by any member of the Court in *Whitehorn* v. *Davison.* (3) The question is whether, assuming that Hudson was guilty of larceny of the car, that fact renders it impossible that any one can have obtained a title to the car from Hudson under the Factors Act; the argument being that no one can under those circumstances prove the owner's consent to the car being in Hudson's possession. The argument against this view was admirably put by Mr. J. A. Hamilton (as he then was) in *Oppenheimer* v. *Frazer* (4), but it was expressly rejected by every

(1) 4 B. & S. 270.
(2) [1907] 2 K. B. 50.
(3) [1911] 1 K. B. 463.
(4) [1907] 2 K. B. 54.

member of the Court. The view taken by the Court in that case as to the want of bona fides on the part of the purchaser of the goods rendered it unnecessary to decide the point, and the opinions of the members of the Court are therefore, I think, strictly speaking obiter and not binding upon us. They deserve however to be treated with the greatest respect, and it is only because I am unable after full consideration to agree with them that I venture to differ from the conclusion at which they arrived. Sect. 2 of the Factors Act provides protection in statutory form to persons who bona fide and without notice of any want of authority on the part of a mercantile agent have, amongst other things, purchased goods from the agent, he being in possession of the goods, with the consent of the owner. I can see no reason why rules and principles of the criminal law are to be introduced for the purpose of putting a construction upon the language of the section. What the section refers to is the consent of the owner. To establish a consent it is no doubt necessary to consider what the state of mind of the owner of the goods was with reference to the possession of them by the mercantile agent. I fail to see how for this purpose or for any purpose of applying the section, it can be material to look into the mind of the mercantile agent, any more than it would be to look into his pocket to ascertain whether he was in a position to pay for the goods. It is not universally true that no title can be obtained from a thief, as witness a sale by a thief in market overt. It is admitted that where possession of goods has been obtained by false pretences, or where a bailee has stolen them, a title by a bona fide purchaser can be made under the section. If so why not where the goods have been stolen by a trick? The question of the guilt of the alleged thief where his intention is all material, is as it appears to me so entirely immaterial in considering whether a title has been made under the Factors Act to the goods which it is alleged that he has stolen, that the two considerations should be kept entirely distinct. To allow the one to be defeated by a consideration of the other is in my opinion to sweep away a great part of the protection which

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the Factors Act was intended to provide, and which when incorporated into a statute was not introducing any new principle but merely continuing one long known to the mercantile law. There may no doubt be cases in which an individual may have obtained possession of goods from the owner with his apparent consent and yet without his real assent—for instance where A.B. obtains possession of goods by representing himself to be C.D. In such a case the owner never has consented to any possession of the goods by A.B., and A.B. may be guilty of larceny, if he intended to defraud. In such a case s. 2 of the Factors Act would not apply, not because A.B. was a thief, but because on looking into the owner's mind it appears that he never did consent to A.B. having any possession of the goods. The state of the mind of the latter appears to me to be quite immaterial, and the question whether A.B.'s conduct amounted to larceny is beside the question. The conclusions at which I have arrived upon the whole case are, first, that the true inference from the facts is that Hudson was not guilty of larceny of the car and, secondly, that even if he was it makes no difference in the result, because upon the evidence it is clear that the plaintiff did consent within the meaning of s. 2 of the Factors Act to Hudson being in possession of the car. For these reasons I think that the appeal must be allowed with costs, and the judgment for the plaintiff set aside and entered for the defendant with costs. Any money in Court to be paid out to the defendant.

SCRUTTON L.J. This appeal raises a difficult and important question on which there has been considerable difference of opinion among judges. The Factors Act, 1889, by s. 2 provides that where a mercantile agent "is, with the consent of the owner, in possession of goods," a sale by him when acting in the ordinary course of business of a mercantile agent shall be as valid as if he had express authority to make it, provided that the purchaser acts in good faith and without notice that the seller has not authority to sell. The question is whether, if it is shown that the mercantile agent though

acquiring possession of the goods with the consent of the owner acquired them by what amounts in the criminal law to "larceny by a trick," the actual possession by the agent or the actual consent by the owner is to be treated as non-existent, so that the conditions required by the Factors Act are not fulfilled. There is a further question whether the facts in this case constitute the offence of larceny by a trick, or only larceny by a bailee, or obtaining goods by false pretences; for it is admitted that in the two latter cases the possession and consent are not invalidated, and the Factors Act gives the purchaser a title. The facts are not in dispute. The respondent, Folkes, was the owner of a car. He authorized a Mr. Hudson, who (as he had notice) was a partner in a firm of Thomas H. Hudson, to sell the car for him at a price not less than 575*l.*, for a commission of 10*l.* To enable Hudson & Co. to carry out the sale, Folkes handed the car over to Hudson. Hudson immediately sold it for 340*l.* to one Alvarez, a motor-car dealer in the Euston Road. Alvarez sold the car to another and ultimately the appellant, King, bought it. The judge finds its market value to be 400*l.* Hudson paid the price into his private account, out of which he was paying for other cars sold in a similar way, and credited his firm with the 10*l.* commission. While Hudson had been acting within his authority in some cases, it is quite clear that in a large number of other cases he was selling below his authorized price, and using the money received for his own private purposes. It is extremely probable that in the present case he intended to do the same, though possibly the owner, if sufficiently pressing, might get his price at the expense of some other sufferer. I attach no importance to the distinction between Hudson and Hudson & Co., as the latter are affected by and responsible for the fraud of their partner.

King to get a title must prove a title acquired by Alvarez from Hudson under the Factors Act. It was not alleged below that Alvarez did not take from Hudson in good faith or that he took with knowledge of the excess of authority. But I think it right to say this: Alvarez did take the car from

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Hudson without production of the book of registry; there was some suggestion of its being lost. If he had required its production, the fraud might never have been carried through. If the production of the book, or if it was said to be lost, of a new one, was required by every purchaser, it would be very difficult to find a market for the cars which have lately been stolen in such large numbers; and the Courts may have to take adverse notice of the conduct of a purchaser who does not require the production of the book of registry.

On these facts the owner contended that though he handed possession of the car to Hudson, intending him to sell it, as Hudson meant at the time he received it to convert the car to his own use, he was guilty of larceny by a trick, which nullified the owner's consent and avoided the operation of the Factors Act. The purchaser contended that as the owner handed the car to Hudson, authorizing him to pass the property in it, though with certain limitations, the offence was not larceny by a trick, but larceny by a bailee or obtaining by false pretences, neither of which would prevent the operation of the Factors Act. He further contended that these artificial distinctions of the criminal law had no application to commercial transactions by operation of the Factors Act, and that if the owner did in fact consent to hand over possession, it was quite immaterial that for the purpose of criminal law the Court would disregard the consent and the transfer of possession.

The state of the authorities is as follows: Willes J. in *Fuentes* v. *Montis* (1), in an admirable judgment to which I refer without reading it, points out the effect of the Factors Acts in adding to that class of cases, including the transfer of negotiable instruments, the transgression by an agent of secret limitations on his ostensible authority, and sales in market overt, where a man can confer a title which he has not himself got, in aid of commercial transactions which otherwise would be made too difficult by reason of the inquiries as to title involved. In *Cole* v. *North Western*

(1) (1868) L. R. 3 C. P. 268; affirmed L. R. 4 C. P. 93.

Bank (1) Blackburn J. discussing the words of the then Factors Act "Agent intrusted with possession" uses the following language: "So, it has been repeatedly decided that a sale or pledge of a delivery order or other document of title (not being a bill of lading) by the vendee does not defeat the unpaid vendor's rights, because the vendee is not intrusted as an agent: *Jenkyns* v. *Usborne* (2); *M'Ewan* v. *Smith.* (3) And it may be observed that, in many of such cases, in which money has been advanced to the buyer on the faith of the document of title, the buyer must have been a person who carried on business as a commission-merchant; yet it never seems to have occurred to any one that that fact made any difference. So, it has been repeatedly held that, where either the goods or documents of title are obtained from the owner (not on a contract of sale good till defeated, though defeasible on account of fraud, but by some trick), a purchaser or pledgee acquires no title, for, the trickster is not 'an agent intrusted' with the possession: *Kingsford* v. *Merry* (4); *Hardman* v. *Booth.* (5) Quite consistently with these latter decisions it was held, first by the Exchequer, on demurrer, in *Sheppard* v. *Union Bank of London* (6), and afterwards by the Court of Queen's Bench, on the facts, in *Baines* v. *Swainson* (7), that, if the true owner did in fact intrust the agent as an agent, though he was induced to do so by fraud, a pledge by the agent would be good." Of the two later cases which he cites, *Baines* v. *Swainson* (7) was a case where a factor obtained goods to deliver to S. by representing fraudulently that he had an order from S., and then sold them to another firm, who it was held were protected by the Factors Act. In *Sheppard* v. *Union Bank of London* (6), it was held that if goods are entrusted to an agent for sale and he has possession and absolute dominion over them as agent though he obtained it "by fraud or misrepresentation" he can give a title under the Factors Acts.

(1) L. R. 10 C. P. 354, 373.
(2) (1844) 7 Man. & G. 678.
(3) (1849) 2 H. L. C. 309.
(4) 1 H. & N. 503.
(5) 1 H. & C. 803.
(6) 7 H. & N. 661.
(7) 4 B. & S. 270.

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These cases appear to show that Blackburn J. in using the words "obtained by some trick" was thinking of cases such as *Hardman* v. *Booth* (1) which he cites, where the true owner actually delivered possession to A, being induced by his fraud to think he was delivering to B, cases of the class of which *Cundy* v. *Lindsay* (2) is an example. Next, Collins L.J. in *Cahn* v. *Pockett's Steam Packet Co.* (3), referring to and purporting to repeat the language of Blackburn J. in *Cole* v. *North Western Bank* (4), says that however fraudulent the agent may be in obtaining actual possession, "provided it did not amount to larceny by a trick" he can give a title under the Factors Act. But the actual decision in the case was this: *Shepherd* v. *Harrison* (5) decided that when a bill of lading with a bill of exchange attached is sent by an owner to a purchaser it is sent on the terms that no property passes unless the bill of exchange is accepted. The purchaser kept the bill of lading but did not accept the bill of exchange, and sold the bill of lading to a third person. It was held that the third person got a good title, because the purchaser obtained possession of the bill of lading with the consent of the sellers, and that the consent was not nullified because the purchaser did not assent to the terms on which it was sent. The language of Collins L.J. was not necessary for the decision, and is, I think, only repeating the language of Blackburn J. in reference to the cases of which that judge was speaking, cases where there was a trick preventing real assent, such as a fraudulent misrepresentation as to the person dealt with. I agree with the comments of Channell J. on these two cases in *Oppenheimer* v. *Frazer*. (6)

Next come the two cases which create the difficulty of authority. In *Oppenheimer* v. *Frazer* (7) the true owner gave diamonds to one S. who represented he could sell them to named customers, but instead purported to sell them through one B. to Frazer, B. and Frazer being jointly

(1) 1 H. & C. 803.
(2) 3 App. Cas. 459.
(3) [1899] 1 Q. B. 643, 659.
(4) L. R. 10 C. P. 354.
(5) (1871) L. R. 5 H. L. 116.
(6) [1907] 1 K. B. 526, 527.
(7) [1907] 1 K. B. 519.

interested. Frazer claimed either the whole or half the goods by a title under the Factors Act, it being proved that B. did not take in good faith. After a direction (which with great respect to the learned judge from whom I have learnt much law was not so clear as those I have heard from him on other occasions) on the nature of larceny by a trick, the jury found that S. obtained possession by larceny by a trick. Channell J. on further consideration held: (1.) that larceny by a trick was immaterial, unless there was such a trick as prevented the true owner consenting to possession by that particular man, as in *Hardman* v. *Booth* (1); (2.) that where there was consent to possession by the man, obtained by his fraudulent representation that he was going to fulfil the agency, when he did not intend to fulfil it, the consent required by the Factors Act was not nullified, and a good title could be obtained under the Act; (3.) that the bad faith of B. did not interfere with the title of Frazer or prevent the Factors Act from applying. I agree with the argument of Mr. Hamilton, and the judgment of Channell J. on the first two points. When the case went to the Court of Appeal (2), all three judges agreed that the view of Channell J. that B.'s bad faith did not affect Frazer was erroneous, and that Frazer got no title under the Factors Act. After that finding Gorell Barnes P. said (3) it was unnecessary to consider the other question, but he would say how it struck him. Kennedy L.J. said it was not necessary actually to decide the point. Fletcher Moulton L.J. expressed a definite opinion on "the other ground upon which," as he said (4), "the defence based upon the Factors Act, 1889, s. 2, sub-s. 1, fails." I think all the three judges expressed the opinion that if there was really larceny by a trick, it defeated the consent necessary for the Factors Act. Fletcher Moulton L.J. thought there was larceny by a trick, defining it in the well-known passage (5) cited in most of the text-books. Gorell Barnes P. and Kennedy L.J. would have sent the case for a new trial on this

(1) 1 H. & C. 803.
(2) [1907] 2 K. B. 50.
(3) [1907] 2 K. B. 63.
(4) [1907] 2 K. B. 68.
(5) [1907] 2 K. B. 73.

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question, evidently thinking the jury had not understood the distinction between larceny by a trick, or by a bailee, or obtaining by false pretences. Kennedy L.J. was inclined to agree with Channell J. that there was no larceny by a trick in that case. Under these circumstances I think there was, as Greer J. thought, no decision binding him or this Court on the points in question here, though the conflicting views of the judges require, of course, most careful consideration. Lastly in *Whitehorn* v. *Davison* (1) Whitehorn gave pearls on sale or return to Bruford on the fraudulent representation of Bruford that he had a customer who would buy them. He had not, but promptly pledged them to Davison, who took them in good faith. The judge who tried the case told the jury Davison must prove he took the pearls in good faith. This was held a misdirection as to the burden of proof and Kennedy L.J. would have granted only a new trial; but Vaughan Williams and Buckley L.JJ. held there was no evidence on which the jury could find lack of good faith in Davison, and entered judgment for him, on the ground that the subsequent transaction was an out and out sale to Bruford, who could therefore pass a title. But they went on to express opinions obiter that there was no evidence of larceny by a trick displacing consent of the true owner to Bruford's possession. Vaughan Williams L.J. said he would have had great difficulty in holding there was larceny by a trick when possession was obtained under a contract for the purpose of selling to a customer. Buckley L.J. thought that where the owner intends to confer on an actual person possession and a power to pass property, even if induced by a trick to do so, the offence is false pretences, and not larceny by a trick. "A man may steal a chattel"—he says (2)—"but he cannot steal the power to dispose of a chattel," though he may obtain that power by false pretences. Kennedy L.J. repeated in rather more emphatic terms his view in *Oppenheimer* v. *Frazer* (3), now agreeing with Channell J. that a bailment and delivery for the purpose of

(1) [1911] 1 K. B. 463. (2) [1911] 1 K. B. 479.
(3) [1907] 2 K. B. 50, 77.

the person to whom the article was delivered himself exercising a disposing power over the property though obtained with a fraudulent intention to use the power for his own purposes, was not larceny by a trick, but obtaining by false pretences. I agree with Greer J. that these statements also were obiter, though entitled to the greatest consideration, and that we are at liberty to express our own views. I proceed to do so.

First on the question whether to prove larceny by a trick is a defence to the Factors Act as excluding consent of the true owner. I can understand that where by a trick there is error in the person there is no true consent and the Factors Act is excluded. But where there is agreement on the person and the true owner intends to give him possession, it does not seem to me that the fact that the person apparently agreeing to accept an agency really means to disregard the agency, and act for his own benefit, destroys the consent of the true owner under the Factors Act. That Act intended to protect a purchaser in good faith carrying out an ordinary mercantile transaction with a person in the position of a mercantile agent. It does not do so completely, for it requires the purchaser to prove that the goods were in possession of the mercantile agent "with the consent of the owner." But it does not require the purchaser in addition to prove that the mercantile agent agreed both openly and secretly, ostensibly and really, to the terms on which the owner transferred possession to the mercantile agent. It appears to me to be enough to show that the true owner did intentionally deposit in the hands of the mercantile agent the goods in question. It is admitted that if he was induced to deposit the goods by a fraudulent misrepresentation as to external facts, he has yet consented to give possession, and the Factors Act applies, but it is argued that if he deposits the goods in the possession of an agent who secretly intends to break his contract of agency the Factors Act does not apply. I do not think Parliament had any intention of applying the artificial distinctions of the criminal law to a commercial transaction, defeating it if there were larceny by a trick, but not if there

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were only larceny by a bailee, or possession obtained by false pretences. I do not quite understand the view that there must be "consent in law," and if there is no contract there is no consent. There may be consent to a state of facts without any contract at all. The history of the Factors Acts is restriction of their language by the Courts in favour of the true owner, followed by reversal of the Courts' decisions by the Legislature. Willes J.'s discussion in *Fuentes* v. *Montis* (1), that where the owner had revoked his consent to the agency, the earlier Factors Acts did not apply, was nullified by legislation introduced in s. 2, sub-s. 2, of the Act of 1889; and there are numerous other instances of the same tendency. The purport of the Act seems to be that an ostensible mercantile agent, ostensibly in possession of goods, can give a good title in the ordinary course of business to a bona fide purchaser, provided that he proves that the owner intended the agent to have possession of the goods. For these reasons I think the question of larceny by a trick of the sort suggested in this case was immaterial, and did not prevent the operation of the Factors Act.

But there is further the question whether the facts in this case constitute larceny by a trick. On this point I take the view taken by Channell J. and Vaughan Williams and Kennedy L.JJ., all very experienced in trying criminal cases, that where an owner delivers goods to an agent, intending not only that he shall have possession, but shall dispose of the property, it is immaterial that the agent, ostensibly agreeing to the contract of agency, yet secretly intends to disregard it. The definition by Fletcher Moulton L.J. in *Oppenheimer* v. *Frazer* (2), "Where the owner of goods is, by a trick employed by a person animo furandi, induced to part with possession of the goods to that person, not intending to pass the property," should be revised by excluding cases where the principal intended that the agent to whom he gave possession should have power to pass the property. Such cases are either larceny by a bailee, or obtaining goods by false pretences, similar to the long firm cases, or the cases where a customer

(1) L. R. 3 C. P. 268. (2) [1907] 2 K. B. 50, 73.

sits down in a restaurant, obtains a meal and then refuses to pay. The offence commonly called larceny by a trick was supported by judicial decisions at a time when larceny by a bailee was not an offence, that is before the Act of 1861 creating the offence of larceny by a bailee. A bailee being in possession by consent of the owner could not at common law deprive the owner of possession so as to commit larceny. The judges met this difficulty by holding, in the words of Hawkins' Pleas of the Crown (1), that "where the property is obtained with a preconcerted design to steal it, the possession is supposed to continue with the true owner, whatever may be the means or the pretence under which the property is obtained." Hawkins uses the word "property" instead of "goods," but is not, I think, referring to legal rights, but physical things, as it is clear that if the legal property passes, dealing with it is not larceny. Sir James Stephen (2) defined the offence thus: "Theft may be committed by fraudulently obtaining from the owner a transfer of the possession of a thing, the owner intending to reserve to himself his property therein, and the offender intending, at the time when the possession is obtained, to convert the thing without the owner's consent to such conversion." The consolidating statute of 1916 (3) is not helpful in the matter as it includes in "taking" "obtaining the possession by any trick" without defining "a trick," or distinguishing "obtaining possession and property by a fraudulent pretence." Greer J. substantially follows Fletcher Moulton L.J.'s definition and includes in larceny by a trick, cases where the owner intended the agent to have limited power to pass the property. In the present case, if the agent had sold for the authorized price, as no doubt he intended to do if he could get the price, but then appropriated the price to himself, intending to do so from the start, I cannot conceive that he would not pass the property in the car. I think the position is the same if the owner gives the agent power to dispose of the

(1) Vol. i., Leach's ed., p. 210; Curwood's ed., p. 145.

(2) Digest of the Criminal Law, art. 324, 5th ed. (1894), p. 259.

(3) 6 & 7 Geo. 5, c. 50, s. 1.

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property in certain events only, the limitation of authority being secret.

But this second point is not necessary to decide if I am right in my first view that even if the facts do constitute larceny by a trick, that does not defeat the operation of the Factors Act. That is my view, and in my opinion therefore the appeal should be allowed with costs, and the judgment for the plaintiff for 400*l.* with costs set aside, and judgment entered for the defendant with costs, the money in Court being paid out to him.

EVE J. The question involved in this action is which of two innocent persons is to suffer for the fraudulent conduct of a third. The facts lie in a narrow compass. On March 14, 1921, the plaintiff delivered his Austin touring motor car to a partnership firm of which Thomas A. Hudson was a member and the only member with whom the plaintiff had any correspondence or dealing. The firm carried on an extensive business as dealers in motor cars and the plaintiff's car was so delivered to them with instructions to sell it for not less than 575*l.* Their practice was to charge a fixed commission of 10*l.* on the sale of a car irrespective of the price realized. The receipt of the car and the limitation of the authority are acknowledged in Hudson's letter to the plaintiff of the date already mentioned.

On the day he received the car Hudson, without the knowledge of the plaintiff, sold it and another Austin car to Benjamin Alvarez, a motor-car dealer in the Euston Road, he in turn resold it on the same day to a Mr. Simons for 390*l.* and on April 13 the defendant purchased it for 500*l.* from one Harris. No reflection is made on the bona fides of Alvarez—who was well acquainted with Hudson and had bought a number of cars from him before March 14—or of the defendant or the intermediate purchasers, and if the matter rested there it cannot be doubted that the defendant's title would be unassailable and this action brought to recover the car must fail. Sect. 2 of the Factors Act, 1889, would be a complete

answer to any claim by the plaintiff to impeach the transaction between Hudson and Alvarez and his remedy for breach of his instructions not to sell for less than 575*l.* would be restricted to the recovery of damages from his agents, Hudson's firm.

But the matter does not rest there, and it is argued on behalf of the plaintiff that the circumstances in which Hudson became possessed of the car establish larceny by a trick on his part, and that a person who has so obtained possession of goods cannot be held to be in possession of them with the consent of the owner. The circumstances relied on are that in March, 1921, Hudson had ceased to carry on any genuine business as a motor-car dealer and had embarked on a criminal career, getting possession of cars on the representation that he could readily dispose of them, but selling them at once for what he could obtain for them and pocketing the proceeds in fraud not only of the owner of the car but also of his own partner or partners. It appears from the evidence that at the time when the plaintiff's car was delivered to him or his firm these tactics had been resorted to in some fifty cases and that Hudson was in desperate straits for money wherewith to meet cheques drawn to satisfy the demands of owners of cars previously disposed of by him.

Assuming the proper inference to be drawn from the evidence is that Hudson was obtaining possession of the car with the deliberate and pre-conceived intent to steal it, was the transaction larceny by a trick? I think not, in a civil proceeding. I do not presume to offer an opinion whether it might not be so in criminal proceedings wherein the intent of the recipient may be a relevant factor. But here the plaintiff's own evidence is that he took the car to Hudson for the purpose of his selling it as soon as possible; in other words he voluntarily parted with the possession of it intending to confer a power on Hudson to pass the property to any one willing to give 575*l.* for it. It may well be that he was induced to do this in the belief engendered by the letters of March 7 that Hudson and his firm were carrying on a legitimate business, and in that sense possession of the car may be

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said to have been obtained by a trick, but not by larceny by a trick, possibly by false pretences if anything.

I think the facts of the case bring it entirely within the decision of this Court in *Whitehorn* v. *Davison* (1), and the extracts from the judgment of Kennedy L.J. in that case which I am about to read appear to me to apply exactly to the present one. The Lord Justice says (2): "I do not think that a case such as this, where, even on the plaintiff's view, there was a bailment and delivery, and not that alone, but a bailment and delivery for the purpose of the person to whom the article was delivered himself exercising a disposing power over the property, can be properly described . . . . as larceny by a trick, resulting in a void, and not a merely voidable, contract"; and at the top of the next page he adds: "Not only was the possession parted with, but a right was also given to the bailee to confer the property in the article on a third person." I think the appeal should be allowed and the action be dismissed.

Appeal allowed.

Solicitor for appellant: *Newton G. Driver.*
Solicitors for respondent: *Castle & Co.*

(1) [1911] 1 K. B. 463. (2) [1911] 1 K. B. 485.

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Alien—Name—Business carried on under Name other than that by which Alien ordinarily known—Pre-war Business continued by Alien under same Name—Aliens Restriction (Amendment) Act, 1919 (9 *&* 10 *Geo.* 5, *c.* 92), *s.* 7, *sub-ss.* 1, 2.

The Aliens Restriction (Amendment) Act, 1919, s. 7, sub-s. 1, provides that "an alien shall not for any purpose assume or use or purport to assume or use or continue after the commencement of this Act the assumption or use of any name other than that by which he was ordinarily known on August 4, 1914."

Sub-s. 2: "Where any alien carries on or purports or continues to carry on, or is a member of a partnership or firm which carries on, or which purports or continues to carry on any trade or business in any name other than that under which the trade or business was carried on on August 4, 1914, he shall, for the purpose of this section, be deemed to be using or purporting or continuing to use a name other than that by which he was ordinarily known on the said date."

The respondent, who was an alien, and whose real name was Karel Kollross, purchased in 1921, and continued to carry on, a business under the name of the Widmore Laundry, which business had been carried on under the same name by his predecessors for many years before August 4, 1914. Apart from the laundry business the respondent continued to be known as Karel Kollross and he was registered in that name as the proprietor of the Widmore Laundry under the Registration of Business Names Act, 1916. An information having been preferred against the respondent for using the name Widmore Laundry, being a name other than that by which he was ordinarily known on August 4, 1914, contrary to s. 7 of the Aliens Restriction (Amendment) Act, 1919, the justices dismissed the information:—

Held, that the justices were right, as the respondent had committed no offence against s. 7, sub-s. 1, by taking over an old-established business with a pre-war name and continuing to carry it on under that name.

CASE stated by Bromley justices.

An information was preferred by the appellant, a sub-divisional inspector of police, against the respondent for that he on July 4, 1922, did, for the purpose of carrying on a laundry business at 7, Bickley Road, use a name—namely, Widmore Laundry, being a name other than that by which he was ordinarily known on August 4, 1914, contrary to s. 7, sub-s. 1, of the Aliens Restriction (Amendment) Act, 1919.

At the hearing the following facts were proved or admitted: The respondent, who was an alien within the meaning of

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the said Act of 1919, on July 4, 1922, was carrying on at 7, Bickley Road, Bromley, a laundry business under the name of the Widmore Laundry, which business had been carried on for many years before August 4, 1914, and until August, 1921, in the name of the Widmore Laundry, by one J. Downs and his predecessors. In August, 1921, the respondent bought the business from Downs, and continued to carry it on under the same name. The true name of the respondent was Karel Kollross, and that was the name by which he was ordinarily known on August 4, 1914. Apart from the laundry business, he continued to be known as Karel Kollross on July 4, 1922, and he was registered in that name as the proprietor of the Widmore Laundry under the Registration of Business Names Act, 1916.

For the appellant it was contended that the respondent was, for the purposes of his business, using the name, the Widmore Laundry, being a name other than that by which he was ordinarily known on August 4, 1914.

For the respondent it was contended that he was not, on July 4, 1922, using the name Widmore Laundry within the meaning of s. 7, sub-s. 1, of the Act, and the attention of the justices was called to sub-s. 2 of the same section.

The justices upheld the respondent's contention and dismissed the information, but stated this case for the opinion of the Court.

Montgomery K.C. and *C. W. Lilley* for the appellant. This is a test case to have the true construction of s. 7, sub-s. 1, of the Aliens Restriction (Amendment) Act, 1919, determined. That sub-section, it is submitted, includes the use of a name by an alien whether for himself or for a business; and as the respondent used a name in connection with a business other than that by which he was ordinarily known on August 4, 1914, he has committed an offence. Sub-s. 2 applies only where an alien was carrying on a business on August 4, 1914.

[LORD HEWART C.J. Ought we to read sub-s. 2 as a proviso to sub-s. 1 ?]

No. Sub-s. 2 was added to cover cases that might not come within sub-s. 1. The Act was intended to restrict the use of names by aliens and in this case the respondent by the use of the name Widmore Laundry was using a name which did not disclose the fact that he was an alien.

B. H. Waddy for the respondent was not called upon.

LORD HEWART C.J. having stated the facts, continued: The question turns upon the construction of s. 7, sub-ss. 1 and 2, of the Aliens Restriction (Amendment) Act, 1919, and no doubt it is possible, and indeed easy, to frame difficult conundrums upon those provisions. But when one looks at them without a desire for controversy, I think that they are open to a reasonable and simple interpretation. Sub-s. 1 states the universal major proposition. Sub-s. 2 is obviously limited to the special difficulty presented by the case of a business which was carried on before the war under a particular trade name. It says that in relation to that special and limited class of businesses which were carried on under particular names before the outbreak of war the alien's duty is not to change those known business names. It is said in argument that that may leave a serious casus omissus if the object of the sub-section is to render identification easy. That is not really so serious as it might at first sight appear, because, ex hypothesi, the sub-section is dealing only with the case of an old business. If the alien is starting a new business sub-s. 2 has no application, and the general words of sub-s. 1, "for any purpose," would for that business prevent him from using any name except that by which he was ordinarily known on August 4, 1914. The present respondent, after the passing of the Act of 1919, acquired, in 1921, for the first time the business which was established before August 4, 1914, and at that time was known by the name of Widmore Laundry. What was he to do? It is easy to say that he must not acquire it at all. If he acquired it and changed its name, it might with some reason be said that he was committing an offence. But he committed no offence when,

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taking over an old-established business with a pre-war name, he continued it under its pre-war name. Some meaning must be given to the antithesis suggested by the opening words of sub-s. 2, where an alien "carries on" a trade or business on the one hand and "continues to carry [it] on," on the other hand. The words "carries on" are clearly wide enough to cover the case where an alien after the war, and indeed after the passing of the Act, acquires a business formerly carried on by others. In these circumstances what the Act requires of him is that he shall not change the name of that business. Whether if those responsible for the drafting of the Act had been able to foresee every conceivable case that might arise, they would have inserted some other provision it is not necessary to speculate. We have to deal with the sub-sections as we find them, and, having regard to their language and the facts of this case, I am of opinion that the justices came to a correct determination, and therefore that the appeal should be dismissed.

DARLING J. In this case the respondent, who is an alien, desires to carry on a laundry business in England. There is no statute which, in plain terms, says that he may not do this. He desired to buy a business called Widmore Laundry and being desirous of acting within the law he would look at s. 7 of the Act of 1919 to find out what he had to do. After reading sub-s. 2 he would naturally say: "I will not change the name of the business and so I shall not be committing an offence." For the appellant it is said that the fact that the respondent does not commit an offence against sub-s. 2 involves that he must be convicted under sub-s. 1, because the two sub-sections are inconsistent. I do not know and shall not attempt to say to what exactly and exclusively sub-s. 1 was meant to apply, but when I find that sub-s. 2 makes it an offence for an alien to do certain things and he has avoided doing those things which would amount to an offence under sub-s. 2, I come to the conclusion that he does not commit an offence under sub-s. 1. I agree therefore that the appeal fails.

SALTER J. I agree. The respondent has not changed his own name or the name of the business he acquired and carried on.

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Appeal dismissed.

Solicitors for appellant: *Wontner & Sons.*
Solicitors for respondent: *Bartlett & Gregory.*

J. S. H.

DEWEY, APPELLANT *v.* FAULKNER, RESPONDENT.

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Dec. 12, 13.

Adulteration—Milk—Defence—Written Warranty—Written Contract for supply of "new milk"—Label attached to Churns—Whether Label Part of Contract—Sale of Food and Drugs Act, 1875 (38 *&* 39 *Vict. c.* 63), *s.* 25.

By a memorandum of agreement made between a dairy company and the respondent, the former agreed to sell and the latter to purchase certain quantities of "new milk" at specified prices to be delivered at the respondent's railway station. Nothing was said in the memorandum that any warranty would accompany the milk, but attached to each of the churns in which the milk was delivered to the respondent was a label with the words, "guaranteed pure unskimmed milk with all its cream." On a prosecution of the respondent under s. 9 of the Sale of Food and Drugs Act, 1875, for having sold some of the milk from which ten per cent. of the original fat had been abstracted so as to affect injuriously its quality, substance, or nature, and without making disclosure of the alteration, the respondent relied as a defence under s. 25 of the Act on a written warranty, which he alleged was contained in (1.) the said memorandum of agreement and (2.) the said written label:—

Held, (1.) that the written label did not form part of the contract between the dairy company and the respondent, as there was nothing to connect it with the memorandum of agreement, and therefore that the two documents could not be read together as constituting a written warranty; and (2.) that the provision in the memorandum of agreement for the supply of "new milk" did not constitute a written warranty within s. 25, as the words "new milk" did not warrant that the milk would be genuine milk.

CASE stated by a Metropolitan Police Magistrate.

An information was preferred by the appellant against the respondent under s. 9 of the Sale of Food and Drugs Act, 1875, for having on May 22, 1922, sold milk from which ten per cent. of the original fat had been abstracted, so as

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to affect injuriously its quality, substance or nature, and without making disclosure of the alteration.

At the hearing on July 6, 1922, the following facts were proved or admitted: On May 22, 1922, the respondent sold to the appellant one half-pint of milk. A sample of the milk was taken and the analyst's certificate showed that ten per cent. of the original fat had been abstracted, that this abstraction had affected injuriously the quality, substance, or nature of the milk, and that no disclosure of any alteration was made by the respondent. The respondent relied on a written warranty within s. 25 of the Sale of Food and Drugs Act, 1875 (1), alleged to be contained in (1.) a memorandum of agreement dated March 24, 1922, and made between him and the South Western Dairies, Ld., of Sherborne, Dorset, and (2.) a written label dated May 21, 1922, attached to the churns of milk. By the memorandum of agreement the dairy company agreed to sell and the respondent agreed to purchase certain quantities of "new milk" at specified prices delivered free to the respondents' station—Vauxhall. To that memorandum of agreement certain conditions were attached, including the following: "(3.) The vendors accept no responsibility for any loss that may be incurred owing to . . . . delay or mishap during transit. Should any consignment arrive at the purchasers' station out of condition the vendors are to be notified by telegram and the milk returned immediately. No claim will be entertained for milk accepted and removed from purchasers' station," and "(4.) the purchasers agree with the vendors that in the event of any claim for loss due to accident, miscarriage or pilferage in transit, being declined by the railway company each party shall allow for one-half the amount of such claim." The written label attached to

(1) Sale of Food and Drugs Act, 1875, s. 25: "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution. . . . ."

the churns was in these terms: "Mr. Faulkner, Vauxhall station, 8 churns, 128 imp. gallons guaranteed pure unskimmed milk with all its cream. From The South Western Dairies, Ltd., Head Office, Sherborne, Dorset, Ex Henstridge depot. 21.5.1922."

On May 22 the respondent collected from Vauxhall railway station eight churns of milk which had been dispatched by the dairy company to him. The respondent took the churns to his shop in Southampton Street, Camberwell, where they were kept until he started on his round. The milk was left alone outside his shop for no more than about half an hour. The respondent strained the milk by putting it through a strainer and noticed that morning that the milk was very buttery.

The milk sold to the appellant by the respondent was milk which had been taken from one of the churns which had attached to it a label in the terms above set out.

For the appellant it was contended (inter alia) that neither the memorandum of agreement nor the label nor both of them constituted a warranty within s. 25 of the Sale of Food and Drugs Act, 1875.

For the respondent it was contended that he was entitled to be discharged from the prosecution under s. 25 by virtue of the written warranty, and that it was proved that the milk in question was part of that received by him from his vendors and was sold in the same condition as when he received it.

The magistrate was of opinion: (*a*) that the memorandum of agreement and label constituted a warranty; (*b*) that Vauxhall railway station was the respondent's station at which the milk was to be delivered free, in accordance with the agreement, and, therefore, that the warranty protected the respondent until the milk was delivered to him at Vauxhall railway station; and (*c*) that the respondent had proved that the milk sold by him to the appellant was part of that received by him from his vendors under the said warranty and was sold to the appellant in the same condition as that in which the respondent received it. The magistrate accordingly dismissed the information.

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The question for the opinion of the Court was whether the magistrate came to a correct determination in point of law.

Disturnal K.C. and *W. Carlyle Croasdell* for the appellant. The magistrate was wrong in holding that the memorandum of agreement coupled with the label constituted a warranty to satisfy s. 25 of the Sale of Food and Drugs Act, 1875. The label is no part of the contract and therefore cannot be taken in conjunction with it as constituting a warranty. For a document to be a warranty it must be a part of the contract under which the person relying on a warranty as a defence has bought, or at any rate it must be given in pursuance of some stipulation in the contract: *Jeynes* v. *Hindle.* (1) In the memorandum of agreement there is nothing to suggest that the contents of the label are to form part of the contract. The label is a mere identification of the churn to which it is attached that it is part of the consignment of milk purchased under the memorandum of agreement. If then the label is disregarded for the purpose of warranty, it is clear that the memorandum of agreement taken by itself does not constitute a warranty, for the mere description of the article sold contained in a document cannot of itself constitute a warranty: *Rook* v. *Hopley* (2) and *Iorns* v. *Von Tromp.* (3) Here, the respondent was to receive under the memorandum of agreement what is described merely as "new milk." There are various grades of new milk. To satisfy the requirements of s. 25 in such a case as this there must be a warranty that the milk is what may be termed statutory milk—genuine milk with all its cream.

Whiteley K.C. and *H. J. Fuller* for the respondent. The magistrate was right in dismissing the information. His finding as to the label is merely a finding that it identifies the consignment as delivered under the contract; it is not a finding that the memorandum of agreement and the label must be read together in order to constitute a written warranty. There is a sufficient warranty in the memorandum

(1) [1921] 2 K. B. 581. (2) (1878) 3 Ex. D. 209.
(3) (1895) 72 L. T. 499.

of agreement. This is the first time that it has been suggested that the words "new milk" cannot constitute a warranty that the milk so described is new milk with all its proper constituents. The memorandum of agreement therefore, taken by itself, constitutes a written warranty which satisfies s. 25. If the Court should, however, come to the conclusion that there is no written warranty contained in the memorandum of agreement the case should be remitted to the magistrate to find whether there was not a verbal agreement at the time the memorandum of agreement was entered into that each churn should have attached to it a label with the words, "guaranteed pure unskimmed milk with all its cream"; the label in those circumstances would clearly constitute a written warranty to satisfy s. 25: *Irving* v. *Callow Park Dairy Co.* (1) and *Jeynes* v. *Hindle.* (2)

LORD HEWART C.J. In this case the real question is whether there was a written warranty of such a kind as to satisfy s. 25 of the Sale of Food and Drugs Act, 1875. In order to succeed in that defence the respondent must show not merely that a warranty accompanied the milk when he took delivery of it, but also that he purchased the milk as being of a certain kind and that he had a written warranty to that effect. Many cases were cited, among others, *Jeynes* v. *Hindle* (3) (where the question turned upon the fact that there was no term in the contract of purchase that there should be a written warranty), *Rook* v. *Hopley* (4) and *Iorns* v. *Von Tromp.* (5) The cases no doubt have gone the length of deciding that if it is a term of the contract of purchase that a written warranty shall accompany the article when delivered, that is a warranty sufficient to satisfy s. 25. In this case I have no doubt that the case made before the magistrate was that the memorandum of agreement for the purchase of the milk and the label affixed to the particular churn, when taken together, although not when regarded

(1) (1902) 87 L. T. 70.
(2) [1921] 2 K. B. 581, 588, 589.
(3) [1921] 2 K. B. 581.
(4) 3 Ex. D. 209.
(5) 72 L. T. 499.

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separately, constituted the warranty. The magistrate has found that the two constituted the warranty. By the memorandum of agreement the dairy company sold and the respondent purchased certain quantities of what is described as "new milk"—a very different expression from that mentioned in some of the reported cases, such as "pure new milk with all its cream." This commodity is described simply as "new milk," and during the argument it was suggested that as the present appellant appears only to have asked for "milk," that which was sold to him was "milk," and as it was bought by the respondent from his vendors as "milk," that is sufficient. If that argument were to prevail the Act would be mere waste paper. The memorandum of agreement describes the milk as "new milk"; it does not stop there, but it provides that the delivery shall be to the purchaser's railway station—Vauxhall—and it sets out certain conditions. [His Lordship read conditions 3 and 4, and continued:] In that memorandum of agreement there is not a word stipulating for any further or other warranty of any kind. To all the churns, however, there was attached a label bearing these words: "Guaranteed pure unskimmed milk with all its cream." As I have said the magistrate's finding, as I read it, is that if the memorandum of agreement and the label are read together as one they constitute a warranty. Is that conclusion right? In my opinion it is not. There is nothing to connect the labels attached to the churns with the stipulations in the contract. On the contrary, the memorandum of agreement purports to contain all the terms agreed between the parties, and it would be a most important variation of that written agreement if we were to add the oral stipulation that the churns should be accompanied by a warranty going beyond what was contained in the memorandum of agreement. We cannot therefore read the label with the memorandum so as to get a warranty out of the two. It has been argued, however, before us, although I doubt whether the suggestion was advanced before the magistrate, that the memorandum, considered by itself, contains a sufficient warranty to satisfy s. 25. If that

contention were right no difficulty would arise; the difficulty arises when one tries to read the label into the antecedent contract. In my opinion it cannot be said that the memorandum of agreement considered by itself amounts to a warranty. When the argument is put in this way, the label becomes merely an identifying document to show that the particular churn was delivered under a contract which in its turn contained the whole warranty. The statute draws a clear distinction between milk considered at large and milk which will satisfy the requirements of the Act; there are skimmed milk, separated milk, and condensed milk. These are contrasted with what the Sale of Milk Regulations call "genuine milk." One cannot help thinking that the experienced persons who devised the form of words "warranted pure new milk with all its cream" did not adopt them by accident or without reflection; they adopted them because they perceived that the words "new milk," taken alone, were not sufficient. New milk may be new milk of various kinds. What is wanted to protect the seller is a warranty that the article is the same in nature, substance and quality as that demanded; in other words, however it may be expressed, it is to be a warranty that the milk is what Mr. Disturnal called "statutory milk," milk which is genuine milk and satisfies the requirements of the statute. The words "new milk" do not fulfil that condition, and the more ample terms contained in the label may be thought to supply a commentary on the meagreness of the description in the memorandum of agreement which is merely "new milk." The person who composed the label rightly thought that it was not sufficient to put upon it the words "new milk." I think, therefore, that this memorandum of agreement does not contain a warranty of such a kind as to satisfy s. 25.

DARLING J. I am of the same opinion. The label can only be looked at to satisfy oneself that the liquid contained in the particular churn was some of the milk purchased under the agreement between the dairy company and the respondent. The statute provides that it is a defence in circumstances

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like these if the milk was purchased with a written warranty. For that the contract can alone be looked at; you cannot look at the label for this purpose. Many cases have been decided on this subject, not all of them easily reconcilable, and I would suggest that those engaged in this trade should, in view of this case, have a proper form of contract drawn up and use it and no other.

SALTER J. I am of the same opinion. This was a prosecution under s. 9 for selling milk from which ten per cent. of the original fat had been abstracted. The analysis, having regard to the Sale of Milk Regulations, 1901, was prima facie evidence that the milk was not genuine. The point was not taken—I express no opinion upon it—whether that was prima facie evidence of an offence under the second part of s. 9. It will be assumed for the purpose of this case that it was and that the respondent accepted that position and relied upon s. 25. Under that section the respondent must prove that he purchased the article as the same in nature, substance and quality as that demanded of him by the prosecutor and with a written warranty to that effect. Here there was no evidence of what the demand by the prosecutor actually was. In the vast majority of cases I should think there is no express demand; the customer holds out a jug to be filled; but I will take it that the respondent was asked for "milk." For the purpose of this Act that is a demand for pure milk—that is to say, milk to or from which no material addition or abstraction has been made—milk as it has come from the cow. The warranty must be a warranty to that effect. The description in this contract is "new milk," and, assuming that to be a warranty at all, it is not wide enough to satisfy s. 25. The terms of the label may be sufficiently wide but the label is not part of the contract.

Appeal allowed.

Solicitors for appellant: *Wedlake, Letts & Birds.*
Solicitors for respondent: *Percy Robinson & Co.*

J. S. H.

[IN THE COURT OF APPEAL.]

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Nov. 24;
Dec. 19.

BAKER AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Stamp Duty—Resettlement of real Estates—"Conveyance or transfer of any kind not hereinbefore described"—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *Sch. I.—"Conveyance or transfer operating as a voluntary disposition inter vivos"—"Disposition in good faith and for valuable consideration"—Finance* (1909–10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 73, *s.* 74, *sub-ss.* 1, 5.

By the Finance (1909–10) Act, 1910, s. 74, sub-s. 1: "Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale. . . . ."

By sub-s. 5: "Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos, and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the Commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred."

The life interest of Sir E. in certain settled estates having been mortgaged by him and the mortgagees having foreclosed, an arrangement was proposed for the repurchase of Sir E.'s life interest. His eldest son F., the tenant in tail in remainder, being then a minor, an application was made to the Court for the approval of a scheme for carrying out the arrangement and the resettlement of the estates, and on that application Sir E. undertook to concur in and be bound by any resettlement the Court might direct. The scheme provided for a disentailing deed being executed and a resettlement of the estates. On coming of age F., with the consent of Sir E. as protector of the settlement, executed a disentailing deed, and thereafter the indenture of resettlement was executed, under which F. received an allowance during the joint lives of Sir E. and himself, a right to 5000*l.* if he married, and a power to jointure:—

Held (affirming the decision of Sankey J.) that s. 74 of the Act of 1910, applied to settlements of real estate, and that the deed of resettlement was a disposition inter vivos within the meaning of the section.

But *held* (reversing the decision of Sankey J.) that although the deed of resettlement was made for valuable consideration, such consideration could not, having regard to the terms of the latter part of sub-s. 5 of s. 74 and to the fact that the Commissioners of Inland Revenue were

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properly of the opinion that the deed of resettlement conferred a substantial benefit on the persons to whom the settled property was transferred, be deemed to be a valuable consideration within the exception contained in the former part of the sub-section.

Held, therefore, that the deed of resettlement was liable to stamp duty under sub-s. 1 of the section.

Decision of Sankey J. [1922] 2 K. B. 786 reversed.

APPEAL from the decision of Sankey J. (1) upon a case stated by the Inland Revenue Commissioners pursuant to s. 13 of the Stamp Act, 1891.

On September 2, 1915, an instrument was presented on behalf of the trustees of the instrument to the Commissioners for their opinion as to the stamp duty with which it was chargeable. The instrument was a resettlement of certain estates made in pursuance of various orders of the Court and of a disentailing deed, and the question raised was whether the conveyance made thereby by Francis Digby Edward Cayley of the property therein mentioned was liable to duty as a conveyance or transfer operating as a voluntary disposition inter vivos within the meaning of s. 74 of the Finance (1909–10) Act, 1910. If that head of charge was applicable it was admitted that the duty at the rate of 1*l.* per cent. on the value of the property thereby conveyed was 689*l.*, and that a further duty of 10*s.* was payable in respect of other provisions contained in the instrument. If that head of charge was inapplicable the duty was admittedly only 10*s.*

The instrument was duly executed by the parties thereto on August 26, 1915, and the circumstances in which it was executed were thus stated by Sankey J.: Sir Everard Cayley was, some time before the war, the tenant for life of certain estates in Yorkshire and in Wales and he had mortgaged his interest therein to an insurance company and deposited certain policies on his life as collateral security. Sir Everard being at the material time in need of money because the insurance company had foreclosed on their mortgage, it became necessary, in order to maintain the family, that steps should be taken to put his affairs upon a satisfactory footing. His family consisted of his wife Lady Mary, a son Francis, a

(1) [1922] 2 K. B. 786.

second son Kenelm, and three daughters. The eldest son Francis was then a minor. The family desired that Francis should go to Cambridge University and that provision should be made for this; further, that provision should be made for freeing the life estate of Sir Everard and also for paying his debts. As Francis and Kenelm were both minors, an application to the Court was necessary, and accordingly an application was made and an order was made thereon dated March 17, 1913, and entitled "In the Matter of the Trusts of an Indenture of Settlement dated July 12, 1882," the parties being Sir Everard Cayley as plaintiff, his infant sons, by their guardian ad litem, and the trustees of the settlement, as defendants. The order recited that "this Court being of opinion that it is for the benefit of the infant defendants that the scheme set forth in the schedule hereto should be carried into effect doth hereby sanction and approve such scheme." The scheme provided for the repurchase of the life interest of Sir Everard in the Cayley settled estates, for the keeping down of the mortgage interest, and, after payment of all necessary expenses and outgoings, for an allowance to Francis if and when he went into residence at Cambridge at a rate not exceeding 300*l.* per annum and, subject as aforesaid, for payment of the balance of the income until the first son of Sir Everard should attain twenty-one if Sir Everard should so long live or until further order to Lady Mary Cayley the wife of Sir Everard to be applied by her for the support maintenance and benefit of all or any one or more exclusively of herself and her children and Sir Everard and so that on the first son of Sir Everard who should live to attain the age of twenty and a half years attaining that age if Sir Everard should then be living application should be made to the judge as to the further application of the income and as to any resettlement which might be proposed of the Cayley settled estates. Documents were duly prepared and a further application was made to the Court to amend the original scheme and on June 2, 1913, an order was made. That order after providing that Sir Everard, the plaintiff in the proceeding and the protector of the settlement, "both personally and

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by his counsel undertaking to concur in and be bound by any resettlement that the Court or a judge may direct to be made," the judge declared that it was for the benefit of the infant applicants that the scheme scheduled to the previous order be amended and added to in certain particulars. The scheme was approved by the guardian ad litem of the infants on December 29, 1914, and on February 4, 1915, by the Court, Francis having on the latter date attained twenty-one. It provided for a disentailing deed being executed by Francis Cayley, the eldest son, with the consent of Sir Everard as protector of the settlement, and for the resettlement of the estates. On February 5, 1915, the disentailing deed was executed, the parties being Francis, now of age, Sir Everard, and the trustees. Subsequently—namely, on August 26, 1915, the instrument now in question, the indenture of resettlement carrying out the various objects mentioned above having been settled and approved by the judge was executed. After a number of recitals it witnessed that in pursuance of the order of February 4, 1915, and of a subsequent order of July 28, 1915, Richard Baker as trustee assigned unto himself and two other persons as trustees the life estates or life interests of Sir Everard Cayley to hold the same (subject to mortgages) upon trust to make certain payments out of the income thereof and out of the residue to pay certain annual sums to Francis Cayley during the joint lives of himself and Sir Everard. It also witnessed that in further pursuance of the said orders of February 4 and July 28, 1915, the said Francis Cayley as settlor of the various estates in Yorkshire and in Wales conveyed those estates to the trustees to be held by them, subject to estates therein for the life of Sir Everard, to the use that Lady Mary Cayley if she should survive Sir Everard should receive a yearly rentcharge of 1000*l.* as collateral security for her two existing jointures of 500*l.* each, and subject thereto to the use of the trustees for the term of five hundred years and subject thereto to the use of Francis for life with remainder to his sons successively in tail male with remainder to the use of Kenelm for life with remainder to his sons successively in tail male with remainder to certain others with

ultimate remainders. Power of jointuring was given to Francis and Kenelm, and in case Francis should marry the trustees were to raise and pay to him a sum not exceeding 5000*l.* for his own use and benefit. The deed also contained an assignment of the policies on the life of Sir Everard to the trustees.

Francis Cayley was killed during the war in September, 1915, and Sir Everard died in December, 1917, when his son Kenelm succeeded to the baronetcy.

No evidence beyond that (if any) alleged by the appellants to be contained in the affidavits before the Court and the orders referred to, the disentailing assurance and the resettlement was offered to the Commissioners that the conveyance by Francis Cayley was bargained for by Sir Everard as the price of his assenting as protector of the settlement to his son's disentailing or that any consideration moved to Francis therefor, and on the Commissioners' construction of the circumstances appearing from the affidavits and orders, Francis's part in the transaction was that of assisting his family in a difficult situation and for the purpose of making such a resettlement as he would himself make of family estates.

The Commissioners were of opinion that the conveyance by Francis Cayley of the remainder in fee expectant on his father's life interest in the Cayley settled estates was not a conveyance in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration, on the ground that the conveyance disposed of the property in accordance with his own wishes and not in accordance with any directions given to him by any person giving him value for the right so to direct. Further, the Commissioners, recognizing that as Sir Everard was, under the Fines and Recoveries Act, 1833, protector of the settlement, he could prevent any disposition by Francis operating to convey any greater estate than a base fee, were of opinion that the giving of his consent by Sir Everard as protector of the settlement was not in the circumstances consideration and, if it was competent to them to be of that opinion, they were of opinion,

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by reason of the inadequacy of the sum paid as consideration and other circumstances, that the conveyance conferred a substantial benefit on the persons to whom the property was conveyed. The Commissioners accordingly assessed the instrument to the duty of 689*l.* and to the further duty of 10*s.*, to which latter duty no objection was raised. If the Court should be of opinion that there was ground for the Commissioners coming to this conclusion the assessment was to be maintained.

The appellants contended that the resettlement was executed by Francis Cayley in pursuance of a contract between him and his father as protector of the settlement in good faith and for valuable consideration and that such execution was the price paid by him for his father's consent to the disentailing assurance (without which the resettlement could not have been made) and also in consideration for the annual and other sums payable to him under the resettlement during the joint lives of himself and his father, that the assent of Sir Everard as protector of the settlement was valuable consideration for the conveyance by Francis, and that, having regard to the circumstances, the conveyance so made was not a conveyance or transfer operating as a voluntary disposition inter vivos, and that s. 74 of the Finance (1909–10) Act, 1910, was inapplicable to the instrument. The appellants being therefore dissatisfied with the Commissioners' assessment required this case to be stated.

The question was whether the instrument was liable to ad valorem duty as a conveyance or transfer operating as a voluntary disposition inter vivos.

Sankey J. held that s. 74 of the Finance (1909–10) Act, 1910, which dealt with the stamp duty on "any conveyance or transfer operating as a voluntary disposition inter vivos," applied to settlements of real estate, and that the deed of resettlement was a disposition in favour of a person in good faith and for valuable consideration within sub-s. 5 of that section and was not therefore liable to ad valorem stamp duty.

The Commissioners of Inland Revenue appealed. The appeal was heard on November 24, 1922. The arguments

used were substantially the same as those used before Sankey J. and are fully stated in the judgments of the Court of Appeal, and it has therefore been thought unnecessary to repeat them.

T. W. H. Inskip S.-G., *Sir Leslie Scott K.C.* and *Sheldon* for the appellants.

Tomlin K.C. and *J. E. Harman* for the respondent trustees.

Cur. adv. vult.

Dec. 19. The following written judgments were delivered:

LORD STERNDALE M.R. In this case the question is whether a certain document, the nature of which I shall describe more particularly, is liable to stamp duty under s. 74 of the Finance (1909–10) Act, 1910, as a conveyance or transfer operating as a voluntary disposition inter vivos or as a "conveyance or transfer of any kind not hereinbefore described," using the words of the Sch. I. to the Stamp Act, 1891. The difference is substantial; in the former case the stamp is 689*l.*, in the latter 10*s.*

The question in the case is a difficult one, for it involves a decision as to the right application of a section in an Act of Parliament to a document and to circumstances probably not in the contemplation of those responsible for the drafting and passing of the Act. It would be impossible for the draftsman of an Act of Parliament to foresee every set of circumstances to which it might become applicable and it would be unreasonable to expect such foresight, but that does not make it easier to arrive at a decision.

The relevant provisions of the Acts of Parliament are, I think, Sch. I. to the Stamp Act, 1891, under the head "Conveyance," and ss. 73 and 74 of the Finance (1909–10) Act, 1910. They are as follows: The Sch. I.: "Conveyance or Transfer on sale, of any property," and then there follow a number of conveyances and transfers of different kinds, and at the end there comes: "Conveyance or Transfer of any kind not hereinbefore described . . . . 10*s.*"

Sect. 73 of the Finance (1909–10) Act, 1910, is as follows:

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"The stamp duties chargeable under the heading 'Conveyance or Transfer on Sale of any Property' in the First Schedule to the Stamp Act, 1891 (in this Part of this Act referred to as the principal Act), shall be double those specified in that Schedule: Provided that this section shall not apply to the conveyance or transfer of any stock or marketable security as defined by section one hundred and twenty-two of that Act, or to a conveyance or transfer where the amount or value of the consideration for the sale does not exceed five hundred pounds and the instrument contains a statement certifying that the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds five hundred pounds."

Sect. 74, sub-s. 1: "Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale: Provided that this section shall not apply to a conveyance or transfer operating as a voluntary disposition of property to a body of persons incorporated by a special Act, if that body is by its Act precluded from dividing any profit among its members and the property conveyed is to be held for the purposes of an open space or for the purposes of its preservation for the benefit of the nation."

Then sub-s. 5: "Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos, and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the Commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other

circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred."

Sub-ss. 4 and 6 of that section were referred to in the argument, but in the view I take I do not think it is necessary to read them.

I think the reading of s. 74, especially of sub-s. 5, shows clearly that the primary idea of its subject-matter was a transfer or sale of property in the ordinary sense for a money consideration and that the primary object of the latter part of the sub-section was to impose the larger stamp duty on a conveyance made for an inadequate money consideration. It appears, however, from the words " or other circumstances " that it is not confined to a case of this kind. The document in this case is not of the simple nature which I have mentioned and it is argued that therefore it is not within the section at all. In order to decide this question it is necessary to examine the effect of the document and the circumstances in which it came into existence. I think I may take those facts from the judgment of Sankey J. [His Lordship read the statement of the facts leading up to the execution of the deed of resettlement of August 26, 1915, and of the provisions of that deed from the transcript of the shorthand notes of the judgment which was substantially the same as that above set out and continued :] It will be seen from this statement that the document is very different from an ordinary conveyance or transfer of property for a price in money, and it is argued that by reason of this difference it is not within s. 74 at all.

It was contended that s. 74 does not apply to transfers of real property, and that this was not a disposition inter vivos. I can see no ground for either of these contentions. There is nothing in s. 74 to limit its application to personal property and I do not think it can be so limited. Again I cannot have any doubt that this document is a disposition inter vivos, and it is none the less so because some of the persons who will eventually benefit by the provisions of the deed were not alive at the time of its execution.

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The next argument is thus, and I think accurately, stated by Sankey J. (1): "First, Mr. Tomlin and Mr. Harman say that s. 74 does not refer to settlements of real property at all; that the deed in question provides for a succession of beneficiaries and that that is not the kind of document which comes within the section. Sect. 74, they say, applies to documents conveying property out and out or gifts to a person. They refer to s. 73, the marginal note of which says: 'Stamp duty on conveyances or transfers on sale,' and say that s. 74, the marginal note to which is 'stamp duty on gifts inter vivos,' is the antithesis of s. 73." I think the answer to it is to be found by looking at the words of s. 74 themselves. This document is clearly a conveyance or transfer, indeed the contention for the respondents is that it is a conveyance within the Sch. I. to the Stamp Act, 1891, and therefore it is prima facie within the words of the section. The question is whether it is excluded from them by reason of the definition of a conveyance operating as a voluntary disposition inter vivos which is contained in sub-s. 5. I see no difficulty in the first part of the section; the words "for valuable consideration" are clearly applicable to such a document. The valuable consideration was described by the learned counsel for the respondents before Sankey J. in this way. The learned judge says (2): "Mr. Harman says that this deed did not operate in favour of a person without consideration. It was, he contends, made for valuable consideration, which, he says, was first, the bargain between Sir Everard and his son under which Sir Everard as protector of the settlement gave his consent; secondly, the son giving up his estate tail, and getting (*a*) an allowance during the joint lives of himself and Sir Everard, (*b*) the right to 5000*l.* on his marriage, and (*c*) a power to jointure." It was also stated to us substantially in the same way. This has been held to be valuable consideration by Hamilton J. in *Attorney-General* v. *Boden* (3), and quite recently by this Court in *Attorney-General* v. *Earl of Sandwich* (4), and I think on the authority of those cases

(1) [1922] 2 K. B. 786, 794.
(2) Ibid. 796.
(3) [1912] 1 K. B. 539, 561.
(4) [1922] 2 K. B. 500.

that but for the latter part of sub-s. 5 it would be held to be full consideration. That latter part of the sub-section if it applies does however put upon the Commissioners the task of making the inquiry which Hamilton J. in *Attorney-General* v. *Boden* (1) said it was not necessary for the Court to make in that case. It is the question of whether there is such an impossibility of applying the latter part of the sub-section to this document as to show that either the whole of the sub-section, or the latter part of the sub-section, cannot apply to it—either result would do equally well for the respondents—which has caused me the greatest trouble. We have not the advantage of the opinion of the learned judge on the point. He held that this was a disposition made by a person in good faith and for valuable consideration under the first part of the sub-section and, if it were not for the latter part which limits the meaning of "valuable consideration," I think there would be no doubt that he was right, but he does not say anything at all about the latter part or apparently consider whether it applies to this document, though he does mention the finding of the Commissioners under it.

I have already said that I think such a document as this was probably not under the consideration of the framers of this sub-section, and that they probably had in their minds the simple case of a transfer for money, and I agree that it imposes a very difficult task upon the Commissioners, but I do not think there is such an impossibility of applying it as to justify me in excluding from the operation of the section a document which is clearly in other respects within it. I have already mentioned that the words "other circumstances" point to something other than pecuniary value being considered and, difficult though the task may be, I can see no impossibility in the Commissioners considering whether the transfer confers a substantial benefit on the person to whom the property is conveyed or transferred. The word "person" in the singular of course includes the plural, and I think the persons to whom the property was conveyed were all the persons taking an interest under the settlement though some were not

(1) [1912] 1 K. B. 539, 561.

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then in existence. If this be right then the Commissioners were the persons to determine whether in their opinion such a substantial benefit was conferred, and unless they proceeded upon some erroneous principle of law, or there were no evidence to support it their finding on that point that the conveyance conferred a substantial benefit on the persons to whom the property was conveyed cannot be disturbed.

I can see nothing in this case to show that the Commissioners proceeded on an erroneous principle of law, or that there was no evidence to support their finding, and therefore on this point I think the appeal of the Crown succeeds, and that the judgment of Sankey J. should be set aside, and the question in the special case answered in the affirmative.

The Crown is entitled to the costs here and below.

WARRINGTON L.J. The question in this case is whether a resettlement of the Cayley family estate is chargeable with ad valorem duty. The Commissioners came to the conclusion that it was so chargeable and assessed the duty at 689*l*. The trustees of the resettlement contending that the instrument was chargeable with a 10*s*. duty only, required the Commissioners to state, and they accordingly did state, a case for the opinion of the Court. On the arguments of this case, Sankey J. decided in favour of the trustees. The Commissioners appeal.

The question turns on the construction of s. 74 of the Finance (1909–10) Act, 1910, and is a difficult one to determine, for I think it is fairly obvious that those who framed the section did not apply their minds to the consideration of the various classes of instruments as to which the question of its applicability might arise.

The facts are fully stated by Sankey J., and I will only give such a summary of them as, supplemented by the fuller statement, will be enough to explain the reasons for my decision. In the early part of 1913, the estates in question stood limited to the use of Sir Everard Cayley for life, with remainder to his first and other sons in tail male, with remainder over. He had a wife living, and several children,

including two sons, Francis and Kenelm. They were both minors. Francis attained twenty-one on February 4, 1915. The life estate of Sir Everard had been heavily mortgaged, the mortgagees had foreclosed, and the family were entirely without means. Under these circumstances, a scheme of family arrangement was sanctioned by the Court, as being for the benefit of the infant tenants in tail male in remainder, under which the life interest was to be purchased from the mortgagees with money raised out of capital, and was to be vested in trustees who were to apply the income for the benefit of the family, including a special provision for the education of Francis. Provision was made for an application to the Court six months before the eldest son should attain twenty-one, as to the terms of any proposed resettlement of the estate. The order sanctioning the scheme was made on March 17, 1913. A supplementary order providing for further payments out of capital was made on June 2, 1913, and in that order Sir Everard undertook to concur in, and be bound by, any resettlement which the Court might direct to be made. The terms of the proposed resettlement were submitted to the Court in due course, and in the order of February 4, 1915, approving them, it was stated that Francis expressed a wish that the resettlement should be made. The resettlement was effected by two documents, a disentailing deed dated February 5, 1915, whereby, with the consent of Sir Everard as protector, the estates were limited to Francis absolutely, who covenanted to execute a resettlement in the terms approved by the order of February 4, 1915. The actual resettlement was dated August 26, 1915. It contained provisions, amongst others, for the payment to Francis of certain annual sums during his father's life, and after the latter's death the estates were limited to the use of trustees for a term of 500 years to secure a jointure to Lady Cayley, and subject thereto to the use of Francis for life, with remainder to his first and other sons in tail male, with remainder to Kenelm for life, with remainder to his first and other sons in tail male, with remainder over. Powers of jointuring and charging portions were conferred on Francis

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and Kenelm, and Francis was to be entitled to require the trustees to raise and pay to him in the event of his marriage the sum of 5000*l.*

I have thus stated what seem to me to be all the material facts. There is no question, I think, that under the Stamp Act, 1891, the instrument in question would have been treated as a conveyance and transfer of property on an occasion not being a sale or mortgage, and would have been subject to a 10*s.* stamp: see s. 62 and Sch. I., "Conveyance or transfer." But the Crown contends that this state of things has been altered by the Finance (1909–10) Act, 1910, s. 74, and that under sub-s. 1 of that section it is now to be charged with an ad valorem duty. The material sub-sections are sub-ss. 1 and 5. [His Lordship read the sub-sections and continued:]

It was contended on behalf of the trustees that this instrument is not a disposition inter vivos, but in my opinion this contention cannot be maintained. The expression "disposition inter vivos" is a well-known legal expression denominating transfers of property taking effect at once, as distinguished from testamentary dispositions, or it may be, others which take effect only in the event of death.

Then it was contended that it only applies to simple transfers of property out and out to immediately ascertained persons, and not to instruments such as the settlement in question. I can see no reason for thus confining the operation of the section, nor for adopting the further contention on behalf of the trustees that it does not apply to transfers of real estate. On these points I agree with Sankey J.

I now turn to the more serious questions raised by the case. I am satisfied that but for sub-s. 5 the instrument, though operating as a disposition inter vivos, did not operate as a voluntary disposition. The immediate and other benefits obtained by Francis were, in my opinion, ample consideration to prevent the disposition being voluntary in the ordinary legal sense of the word: see the judgment of Hamilton J. in *Attorney-General* v. *Boden.* (1) It was in fact,

(1) [1912] 1 K. B. 539, 561.

as are most resettlements of family estates, the result of a bargain between the father tenant for life and his eldest son tenant in tail male in remainder.

The difficulty is caused by sub-s. 5, which in effect provides that a conveyance which would not otherwise operate as a voluntary disposition shall be deemed to be a conveyance operating as a voluntary disposition. The present instrument is not, in my opinion, a disposition in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration, within the meaning of the first part of the sub-section. It is, in my opinion, impossible to read, as Sankey J. did, the sub-section as containing two distinct provisions, and I think it is clear from the latter part, that it is not every consideration, even of money paid, which is valuable consideration within the first part, and it seems to me that if the consideration falls within the description in the second part, the disposition cannot be treated as made in favour of a person for valuable consideration within the exception specified in the first part.

Does the consideration in the present case come within the description in the second part? The words are: "and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the Commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred." Under these words the question whether the consideration shall not be deemed to be valuable, depends upon the opinion of the Commissioners, and unless in expressing their opinion the Commissioners have violated some principle of law or have acted without any evidence capable of supporting their view, the Court has no power to interfere.

The Commissioners in the present case have expressed their opinion that, for the reasons mentioned in the sub-section, the conveyance conferred a substantial benefit on the persons to whom the property was conveyed.

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There was, in my opinion, ample evidence to support this view. From the moment Francis attained his majority the interests of all persons entitled in remainder were precarious and might have been defeated. By the resettlement Francis put it out of his power, and that of his brother Kenelm, to disentail the estates, and it was therefore quite open to the Commissioners to form the opinion at which they arrived.

On the whole, I am of opinion that the appeal ought to be allowed.

YOUNGER L.J. I am of the same opinion, and in view of the judgments just delivered, I can give my reasons in very few words.

In my judgment, s. 74 of the Finance (1909–10) Act, 1910, applies to settlements, and to settlements of real estate, as much as to settlements of personal estate. That the section refers to settlements, cannot, as it seems to me, be doubtful, if regard be had to the terms of sub-s. 4, and to the reference to marriage as a valuable consideration in sub-s. 5. That the section refers to conveyances or transfers, including settlements, of real estate, as much as to conveyances or transfers, including settlements of personalty, is, I think, made clear by the following considerations: The only difference between the conveyance or transfer referred to in s. 73 and the conveyance or transfer referred to in s. 74, is that the conveyance or transfer in the one section is a conveyance or transfer on sale; in the other it is a conveyance or transfer operating as a voluntary disposition inter vivos. In both sections, in s. 74 as much as in s. 73, the conveyance or transfer is to my mind clearly a conveyance or transfer "of any property." This seems to me to be shown: (A) By the introductory words of s. 74, sub-s. 1, "Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale," that is to say, by reference to s. 73, "a conveyance or transfer on sale of any property." (B) The proviso to sub-s. 1 shows that but for it, a conveyance or transfer of land to a company incorporated by special Act

for the purposes (inter alia) of an open space, would have been stampable under the section. (C) The conveyances or transfers described or referred to in sub-s. 6 all may, and some must, be conveyances or transfers of real estate. Lastly, I think it clear that the settlement here in question is a disposition inter vivos within the meaning of the section.

In my judgment, therefore, this resettlement is within the section; and, in my view, although it is not, I think, necessary so to decide, the deed is within the introductory words of sub-s. 5, a disposition in good faith and for valuable consideration in favour of persons not being purchasers or incumbrancers. I can myself see no sufficient reason for confining the valuable consideration given by persons not being purchasers or incumbrancers to a consideration pecuniary in character. Such a consideration is, however, certainly included in that expression as used in the later part of the sub-section, and in the present case the value of the consideration given by Sir Everard Cayley, as protector of the settlement, in consenting to his son barring the entail, was exceptional in this respect. The life interest of Sir Everard in the settled property having been repurchased by the trustees, that life interest had become corpus of the estate. Accordingly, unless his son had been enabled by his father's consent to bar the entail, no part of the income of the property could, during Sir Everard's life, have been made available for any of the parties interested in the settled estates. I think, therefore, that, as I have already said, there was ample consideration, although not pecuniary, for the disposition here in question. At the same time, it was a disposition for which the consideration, not here being expressible in terms of money, made the case one for the Commissioners to inquire into all the circumstances attending the execution of the deed. I cannot doubt that there was evidence justifying the expressed opinion of the Commissioners that the disposition did, in the result, on its execution, confer a substantial benefit on the persons claiming under it. That is a question exclusively for the Commissioners.

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It follows, therefore, I think, that the consideration in fact given is not, for the purposes of the section, to be deemed valuable consideration. The instrument must accordingly be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos, so as to be stampable under sub-s. 1 of the section.

Appeal allowed.

Solicitor for appellants: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Gibson & Weldon, for Tasker Hart & Munby, Scarborough.*

W. I. C.

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[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* WILLIAMS.

Criminal Law—Rape—Consent—Submission—Carnal Connection under Pretence of surgical Operation—Criminal Law Amendment Act, 1885 (48 *&* 49 *Vict. c.* 69), *ss.* 3, 16.

The appellant, who was engaged to give lessons in singing and voice production to a girl of sixteen years of age, had sexual intercourse with her under the pretence that her breathing was not quite right and that he had to perform an operation to enable her to produce her voice properly. The girl submitted to what was done under the belief, wilfully and fraudulently induced by the appellant, that she was being medically and surgically treated by the appellant and not with any intention that he should have sexual intercourse with her:—

Held, that the appellant was properly convicted of rape.

Reg. v. *O'Shay* (1898) 19 Cox, C. C. 76 overruled.

Reg. v. *Case* (1850) 4 Cox, C. C. 220; 19 L. J. (M. C.) 174 and *Reg.* v. *Flattery* (1877) 2 Q. B. D. 410 approved and followed.

APPEAL from a conviction.

The appellant, Owen Richard Williams, was tried at the Liverpool Assizes upon an indictment which charged him in two counts with having had carnal knowledge of Vera Howley without her consent on January 17 and April 28, 1922. There were two further counts which charged the appellant with having indecently assaulted one Ada Mary Cannell upon two occasions.

The appellant, who was the choirmaster of a Presbyterian church, by reason of that fact became acquainted about Christmas, 1921, with Vera Howley, a girl of sixteen years of age, and it was arranged by her parents that she should take lessons in singing and voice production from him. On the occasion of the second singing lesson on January 17 the appellant said that she was not singing as she should and was not getting her notes properly and told her to lie down on a settee. He then removed a portion of her clothing and placed upon the lower part of her body an instrument—which was in the nature of an aneroid barometer and according to the evidence was not in working order and would not in any event have been affected by the breathing of the girl—and then told her to take a deep breath three times. He looked at the instrument and purported to write something in a book. He then dropped on to her and proceeded to have sexual intercourse with her. She said: "What are you going to do?" He said: "It is quite all right; do not worry. I am going to make an air passage. This is my method of training. Your breathing is not quite right and I have to make an air passage to make it right. Your parents know all about it, it has all been arranged; before God, Vera, it is quite right. I will not do you any harm." The girl made no resistance, as she believed what he told her and did not know that what he did was wrong—nor did she know that he was having sexual intercourse with her. The appellant had sexual intercourse with the girl a second time on April 28 in similar circumstances.

The appellant also on two occasions committed an indecent assault upon Ada Mary Cannell, a girl of nineteen years of age, to whom he was also giving lessons in singing and voice production. Upon the pretence that her breathing was not right he put his finger up her private parts, saying that he was making an opening for the air to pass up.

The jury convicted the appellant upon each of the counts and he was sentenced to seven years' penal servitude in respect of the charges of rape and to twelve months' imprisonment in respect of the charges of indecent assault.

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Gorst for the appellant. The evidence in the present case does not support a charge of rape. The appellant had carnal knowledge of the girl by means of a false pretence and the consent of the girl was obtained by that fraud. Sect. 3, sub-s. 2, of the Criminal Law Amendment Act, 1885, provides that "any person who . . . . by false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connexion shall be guilty of a misdemeanour." That Act was passed after the decision in *Reg.* v. *Flattery* (1), where it was held that an act of carnal connection by a quack doctor with a young woman to which she submitted not with any intention that he should have sexual connection with her, but under the belief that he was merely treating her medically and performing a surgical operation, the belief being wilfully and fraudulently induced by the prisoner, amounted to a rape. Ridley J. held in *Reg.* v. *O'Shay* (2) that the effect of that section was to make *Reg.* v. *Flattery* (1) no longer law. He adopted the opinion expressed in art. 270 of Stephen's Digest of the Criminal Law, 5th ed., p. 207, that rape is overcoming a woman by force, and that if a woman gives conscious permission to the act of connection, the act does not amount to rape, although the permission may have been obtained by fraud, and although the woman may not have been aware of the nature of the act. The attention of the judge in that case was however not directed to s. 16 of the Act of 1885, which expressly provides that the "Act shall not exempt any person from any proceeding for an offence which is punishable at common law. . . . ." Rape is defined in Stephen's Digest of Criminal Law as the act of having carnal knowledge of a woman without her conscious permission.

[LORD HEWART C.J. What is conscious permission? Can it be said to be conscious permission when the woman does not know what is being done to her or when she is deceived as to what is being done?]

[DARLING J. referred to *Reg.* v. *Dicken.* (3)]

(1) (1877) 2 Q. B. D. 410. (2) 19 Cox, C. C. 76.
(3) (1877) 14 Cox, C. C. 8.

The crime of rape is always associated with violence. The Criminal Law Amendment Act, 1885, in s. 4 expressly provides that where a man induces a married woman to permit him to have connection with her by personating her husband he shall be deemed to be guilty of rape. In every other case where consent is induced by false pretences or false representations the crime does not amount to rape, although it is a misdemeanour under the Criminal Law Amendment Act. In *Reg.* v. *Barrow* (1) it was held that where consent is obtained by fraud the act done does not amount to rape. That case has never been expressly overruled.

N. B. Goldie for the Crown was not called upon.

The judgment of the Court (Lord Hewart C.J., Darling and Salter JJ.) was delivered by

LORD HEWART C.J. In this case the appellant was convicted upon an indictment which charged him in two counts with committing a rape upon a girl named Vera Howley and in two further counts with committing an indecent assault upon a girl named Ada Mary Cannell. He was sentenced to seven years' penal servitude for the rape and to twelve months' imprisonment for the indecent assault. The facts are that the appellant was the choirmaster at a Presbyterian church, and it was arranged that he should give lessons in singing and voice production to Vera Howley, a girl of sixteen years of age, and subsequently it was arranged that he should give lessons to Ada Mary Cannell, a girl of nineteen years of age. The case for the prosecution was that upon two occasions when the appellant had given a lesson in voice production to Vera Howley he had sexual connection with her and that on two occasions he committed an indecent assault upon Ada Mary Cannell. The jury believed the evidence of the girls and convicted him.

Mr. Gorst has to-day taken one point and one point only on behalf of the appellant—namely, that in view of the evidence the appellant ought not to have been convicted of the crime of rape. In support of that argument the

(1) (1868) L. R. 1 C. C. R. 156.

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attention of the Court has been directed to *Reg.* v. *O'Shay* (1) and to the provisions of the Criminal Law Amendment Act, 1885. There is no doubt that before the passing of the Act of 1885 a man who by fraudulent pretence succeeded in obtaining sexual intercourse with a woman might be guilty of rape. For example in *Reg.* v. *Case* (2) a medical practitioner had sexual connection with a girl of fourteen years of age upon the pretence that he was treating her medically and the girl made no resistance owing to a bona fide belief that she was being medically treated. It was held that he was properly convicted of an assault and might have been convicted of rape. In *Reg.* v. *Flattery* (3) the same principle was affirmed. But it has been argued that the position has been changed by the passing of the Criminal Law Amendment Act, 1885. Mr. Gorst, when the question was specifically put to him, did not contend that that Act would prevent the laying of an indictment for rape in such a case as *Reg.* v. *Flattery* (3), but he said that that Act made an indictment for rape impossible in the present case. That argument is based upon the provisions of s. 3, sub-s. 2, of the Act of 1885, which provides that "any person who . . . . by false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connexion, either within or without the Queen's dominions . . . . shall be guilty of a misdemeanour." It is obvious that those words go beyond a case of rape. It is easy to imagine a case which would come within the comprehensive scope of those words and yet fail to come within a charge of rape. No doubt in *Reg.* v. *O'Shay* (1) Ridley J. did appear to say that after the passing of the Criminal Law Amendment Act *Reg.* v. *Flattery* (3) was no longer law. And the headnote of the case accordingly says that "the effect of the Criminal Law Amendment Act, 1885, is to set aside *Reg.* v. *Flattery* (3), and it is a good defence to an indictment for rape that the carnal knowledge alleged in the indictment was had with the consent of the woman,

(1) 19 Cox, C. C. 76.
(2) (1850) 4 Cox, C. C. 220; 19 L. J. (M. C.) 174.
(3) 2 Q. B. D. 410.

even though such consent had been obtained by fraud, but the prisoner may be convicted of an indecent assault." It is however quite clear when one looks at the report of the case that the attention of the judge was not directed to s. 16 of the Act of 1885. That section makes it plain that the provisions of the statute were not in the least intended to interfere with the liability of a person for an offence punishable at common law, but were intended to supplement the offences punishable at common law. In the opinion of this Court the decision in *Reg.* v. *O'Shay* (1) was given under a misapprehension.

Reference has been made in the course of the argument to *Reg.* v. *Dicken* (2), which was tried at the Stafford Assizes in 1877. In that case a man was charged with rape upon a girl above the age of twelve and under the age of thirteen years. Mr. C. J. Darling (as he then was) argued that the prisoner could not be convicted of felony. He said that the prisoner "was charged with rape. That offence consisted in his unlawfully and carnally knowing the girl against her will—i.e., without her consent. But such an offence was now defined in 38 & 39 Vict. c. 94, s. 4, and thereby declared to be a misdemeanour. Consequently, with respect to girls between the age of twelve and thirteen the earlier statutes making that offence a felony were repealed." That argument depended upon the words in the statute: "whether with or without her consent." Mellor J., who was the judge trying the case, said: "The carnal abuse of children having excited the attention of the Legislature, they have been specially protected by Acts of Parliament. 24 & 25 Vict. c. 100, s. 51, enacted that 'Whosoever shall unlawfully and carnally know and abuse any girl being above the age of ten years, and under the age of twelve years, shall be guilty of a misdemeanour.' Under this provision an offender was punishable, whether the girl did or did not consent to his act. In 1875 it was thought desirable that further protection should be given to young girls, and the limit of ten years was extended, by 38 & 39 Vict. c. 94, s. 4, declaring that 'Whosoever shall

(1) 19 Cox. C. C. 76. (2) 14 Cox, C. C. 8.

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unlawfully and carnally know and abuse any girl being above the age of twelve years, and under the age of thirteen, whether with or without her consent, shall be guilty of a misdemeanour.' Ex abundanti cautela the words 'whether with or without her consent' were inserted in the later enactment; but, save in respect of the alteration in the age of the girl, the law remained exactly as it was previously—that is to say, if she consented, the prisoner might be convicted of the statutory misdemeanour; if she did not, a fortiori he might be so. But if she did not consent, his offence would amount also to the higher crime—the felony—of rape, and he might be indicted and tried for it quite irrespective of the modern statutes throwing special protection around children. The present indictment is for rape, and therefore if the girl consented to the carnal knowledge, the act was not done 'against her will,' and the crime is not made out. It would be preposterous to suppose that Parliament intended to repeal the law of rape as to girls of the very age during which extra statutory protection is cast over them, and I am clearly of opinion that no such repeal has been effected." Those are the observations of a judge with regard to a statute which contained no such provision as is contained in s. 16 of the Act of 1885. There is a footnote to the report to the effect that Sir James F. Stephen in a note to 38 & 39 Vict. c. 94, s. 3, on p. 173 of his Digest of the Criminal Law, 3rd ed. writes of the phrase "with or without her consent": "These words are obviously a mistake. In the preceding section (where they do not appear) they would have been superfluous, but harmless. In this section they are mischievous; for if taken literally, they make it impossible to commit a rape upon a girl between twelve and thirteen, as they provide that carnally to know a girl between twelve and thirteen without her consent is a misdemeanour. . . . it is impossible to suppose that Parliament can have intended the monstrous consequence pointed out above."

In the present case the argument on behalf of the appellant must amount to this—if it be a sound argument at all—that after the passing of the Act of 1885 it is no longer possible

to indict a man for rape in such cases as *Reg.* v. *Case* (1) and *Reg. v. Flattery.* (2) That is to say that inasmuch as there is a statute which makes the obtaining of carnal connection with a woman by false pretences a misdemeanour that offence can no longer be a rape. That proposition cannot be the law for the same reason as that stated by Mellor J. in *Reg.* v. *Dicken* (3), even if s. 16 of the Act of 1885 be disregarded, but in view of that section the proposition is obviously untenable. Branson J. stated the law in the course of the summing up in the present case in accurate terms. He said: "The law has laid it down that where a girl's consent is procured by the means which the girl says this prisoner adopted, that is to say, where she is persuaded that what is being done to her is not the ordinary act of sexual intercourse but is some medical or surgical operation in order to give her relief from some disability from which she is suffering, then that is rape although the actual thing that was done was done with her consent, because she never consented to the act of sexual intercourse. She was persuaded to consent to what he did because she thought it was not sexual intercourse and because she thought it was a surgical operation."

As reference has been made to Stephen's Digest of the Criminal Law it may be pertinent to refer to a passage in Russell on Crimes, 7th ed., vol. i., p. 934, where reference is made to various cases on this point including *Reg.* v. *Young.* (4) The conclusion of the matter according to the editors is this: "A consent or submission obtained by fraud is, it would seem, not a defence to a charge of rape or cognate offences." In the opinion of this Court that is a true proposition and nothing contained in the Act of 1885 diminishes the offence of rape at common law in such cases as *Reg.* v. *Flattery* (2) and *Reg.* v. *Case.* (1) The appeal must therefore be dismissed.

Appeal dismissed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for Crown: *Town Clerk, Liverpool.*

(1) 4 Cox, C. C. 220.
(2) 2 Q. B. D. 410.
(3) 14 Cox, C. C. 8.
(4) (1878) 14 Cox, C. C. 114.

R. F. S.

1922
July 21.

SCOTTISH METROPOLITAN ASSURANCE COMPANY, LIMITED *v.* P. SAMUEL AND COMPANY, LIMITED.

[1921. S. 6177.]

Insurance (Marine)—Broker—Payment of Loss under Policy to Broker—Payment under Mistake of Fact—Broker's Lien as against Assured for unpaid Premiums—Right of Underwriters to recover back Money from Broker.

A policy of marine insurance, effected by the defendants as brokers on behalf of shipowners, was subscribed by the plaintiffs who, on a claim being made in respect of an alleged loss, paid the brokers their share of the loss. Shortly afterwards the plaintiffs, having ascertained that some of the underwriters had refused to pay on the ground that the loss was not a fair loss, claimed the return from the brokers of the money paid to them. The brokers refused to return the money, alleging that the money had been credited in their books to the assured and that they had a lien upon it for premiums which were overdue and unpaid to them by the assured:—

Held, on the assumption that the money was paid under a mistake of fact, that the money was not the money of the assured, that in consequence the brokers had no lien upon it, and therefore that the brokers were liable to refund the money to the plaintiffs.

Buller v. *Harrison* (1777) 2 Cowp. 565 followed.

ISSUE tried before Bailhache J. in the Commercial Court.

By a policy of marine insurance dated January 28, 1920, the hull and machinery of the steamship *Dorothy Talbot*, which was owned by the Talbot Steamship Co., Ld., were insured for 20,000*l.* from December 19, 1919, to December 19, 1920. The policy was subscribed by the plaintiffs for 1600*l.*

The defendants were insurance brokers and acted on behalf of the Talbot Steamship Co., Ld., in effecting the insurance.

A claim was made on the underwriters to pay a particular average loss suffered by the vessel and they received a letter from the average adjusters recommending payment of 31 per cent. of the amount insured. The plaintiffs accordingly on April 15, 1920, paid to the defendants on behalf of the Talbot Steamship Co., Ld., the sum of 496*l.* in respect of the loss.

On April 29, 1920, the plaintiff company ascertained that certain other underwriters who had subscribed the policy refused to pay on the ground that the loss was not a fair loss and that the policy was therefore void.

On April 30, 1920, the plaintiffs gave notice to the defendants that the sum of 496*l.* had been paid to the defendants under a mistake of fact and was not to be paid over to the Talbot Steamship Co., Ld., but was to be returned to the plaintiffs.

The defendants replied that the money had been duly credited to the Talbot Steamship Co., Ld., in the defendants' books, but that as the Talbot Steamship Co., Ld., owed the defendants a considerably larger amount for premiums which the defendants had paid on behalf of the Talbot Steamship Co., Ld., the defendants were unable to comply with the plaintiffs' request to return the money, the defendants having a lien on the money for the premiums.

The plaintiffs commenced an action in which they claimed to recover 496*l.* as money received by the defendants to the use of the plaintiffs, alternatively as money paid under a mistake of fact—namely, that the policy was in force and could not be avoided, that the *Dorothy Talbot* was damaged by perils insured against and that the loss was a fair loss, whereas the policy was voidable and/or void and of no effect and the *Dorothy Talbot* was not damaged by any of the perils insured against and the loss was not a fair loss.

The defendants by para. 6 of the Points of Defence alleged that upon receipt of the sum of 496*l.* the defendants as brokers were entitled to a lien thereon in respect of premiums which were then overdue and unpaid to them by the Talbot Steamship Co., Ld. That upon receipt of the sum of 496*l.* the defendants applied the same pro tanto, as they were entitled to do by virtue of their lien, towards the payment of the amount of the overdue premiums and that even if the notice alleged by the plaintiffs to have been given was in fact given, the defendants were entitled to retain the sum.

An order was made for the trial of the issue as to the plaintiffs' right to recover the money on the assumption

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that it had been paid under the alleged mistake of fact and postponing the trial of the question whether it had in fact been paid under the mistake of fact.

Evidence was given on behalf of the defendants that the Talbot Steamship Co., Ld., owed them about 2000*l.* for premiums paid in connection with the *Dorothy Talbot* and over 4000*l.* for premiums paid in connection with other ships. The defendants were pressing the Talbot Steamship Co., Ld., for payment and threatening to issue a writ, but they refrained from doing so pending the collection of the money payable under the policy.

S. L. Porter for the plaintiffs. The defendants are not entitled to retain the money paid to them in mistake by the plaintiffs and which they have not paid over to their principals. If money is paid by mistake to an agent and placed by him to the account of his principal, but not paid over, the agent will be liable to repay the money to the person so paying it by mistake. The mere passing of such money in account without any new credit given to the principal is not sufficient to discharge the agent as being equivalent to a payment over: *Buller* v. *Harrison* (1) That was an action for money had and received, brought by the plaintiff against the defendant, to recover back a sum of 2100*l.* paid him as due under a policy of insurance, as agent for the assured, Messrs. Ludlow & Shaw, resident in New York. That sum the plaintiff had paid, thinking the loss was fair. Notice of the loss was given by the defendant to the plaintiff on April 20. Part of the money was paid at that time and the remainder on May 6 following, on which day the defendant passed the whole sum in his account with Messrs. Ludlow & Shaw and gave credit to them for it against a sum of 3000*l.* in which they stood indebted to him. On May 17 notice was given by the plaintiff to the defendant that it was a foul loss. At that time nothing had happened to make the defendant's position different from what it was on April 20. The question at the trial was whether the action could be maintained against

(1) 2 Cowp. 565, 566, 568.

the defendant, as agent of the insured, which depended on whether the defendant having placed this money to the account of his principals was equivalent to payment. Lord Mansfield said: "In general the principle of law is clear; that if money be mispaid to an agent expressly for the use of his principal, and the agent has paid it over, he is not liable to an action by the person who mispaid it: because it is just, that one man should not be a loser by the mistake of another; and the person who made the mistake is not without redress, but has his remedy over against the principal. On the other hand it is just, that as the agent ought not to lose, he should not be a gainer by the mistake. And therefore, if after the payment so made to him, and before he has paid the money over to his principal, the person corrects the mistake; the agent cannot afterwards pay it over to his principal, without making himself liable to the real owner for the amount. But the present case turns upon this; that the agent was precisely in the same situation at the time the mistake was discovered as before." Lord Mansfield held that the defendant was not entitled to retain the money. Upon a motion for a new trial Lord Mansfield said: "Now the law is clear, that if an agent pay over money which has been paid to him by mistake, he does no wrong; and the plaintiff must call on the principal; and in the case of *Muilman* v. ——, where it appeared that the money was paid over, the plaintiff was non-suited. But, on the other hand, shall a man, though innocent, gain by a mistake, or be in a better situation than if the mistake had not happened? Certainly not. In this case, there was no new credit, no acceptance of new bills, no fresh goods bought or money advanced. In short, no alteration in the situation which the defendant and his principals stood in towards each other on the 20th of April." Before an agent who has received money paid by mistake is discharged, the money must have been paid over to the principal, or it must have been passed on in the settlement of an account with the principal which has been assented to by the principal. Neither of those events has happened in the present case. The defendants by their

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defence claim that they as brokers have a lien upon the moneys paid to them by the plaintiffs in respect of the premiums which were overdue and unpaid to them by the Talbot Steamship Company. But by so doing they claim to receive and apply the money for their own benefit, and cease to be a mere conduit-pipe, and in that case are liable to refund money paid under a mistake of fact: see *Newall* v. *Tomlinson* (1); *Continental Caoutchouc Co.* v. *Kleinwort.* (2)

Wallington for the defendants. The plaintiffs are not entitled to recover this money from the defendants even on the assumption that the policy was voidable and that the money was paid by the plaintiffs under a mistake of fact. The defendants received the money as agents for the assured, and therefore the *Kleinwort Case* (2) has no application, because there Messrs. Kleinwort received the money not as agents but as equitable assignees. The defendants had a lien upon the money for the premiums they had paid for the assured and they applied it in discharge of their lien, and having done so they are entitled to retain the money, because they have altered their position in two ways; first, they have prevented themselves to the extent of the payment from asserting their lien against the assured; and secondly, having received this money from the plaintiff and knowing that other sums were being paid under the policy, they have given time to the assured for payment of the overdue premiums and have refrained from asserting their legal rights. This is sufficient to prevent the plaintiff from recovering. The defendants are entitled to retain the assured's money in their possession in reduction of their lien which is equivalent to a mortgage and they are in the same position as if they had paid it over to a third party. At the time *Buller* v. *Harrison* (3) and *Holland* v. *Russell* (4) were decided the broker's lien did not exist. The existence of that lien at the present time enables the present case to be distinguished from those cases. Although the defendants are not entitled to say that this money was their money, as was done in the

(1) (1871) L. R. 6 C. P. 405.
(2) (1904) 9 Com. Cas. 240.
(3) 2 Cowp. 565.
(4) (1863) 4 B. & S. 14.

Kleinwort Case (1), yet as the money was in their possession they are entitled to say that they have a lien upon it.

[BAILHACHE J. Can a broker say that money which has been paid under a mistake of fact is money belonging to the assured ?]

At the time the money was paid by the plaintiffs there was no suggestion that it was not the money of the assured and therefore the defendants were entitled at that time to exercise their lien upon it, and the fact that subsequently it appeared that the money was not the assured's does not prevent the lien being good. The defendants wrote to the assured that they had received this money and placed it to their credit which discharged the defendants' lien to that extent ; the case therefore comes directly within the principle of *Buller* v. *Harrison* (2) as being a new credit. After writing that letter the defendants could not return the money without the authority of the assured. Although there was no settled account in the ordinary sense between the defendants and the assured, yet the dealing with the money in this way was equivalent to a settled account and the defendants are therefore entitled to retain it.

S. L. Porter in reply. The contention that the defendants acted to their prejudice by giving time to the assured and that therefore the plaintiffs are precluded from recovering, would, if sound, have been a good answer in *Buller* v. *Harrison* (2) and many other cases, but such a contention has never been put forward before. The "new credit" referred to in *Buller* v. *Harrison* (2) as altering the position between a broker and his principal means the lending of fresh money and does not mean the forbearance to sue for a short time.

BAILHACHE J. This is an interesting case, because Mr. Wallington has raised a new point which if it is a good one has been unaccountably overlooked in a long series of cases going as far back as *Buller* v. *Harrison*. (2) The facts are very short and simple. The defendants had paid a considerable sum of money amounting to 2000*l.* to underwriters for premiums

(1) (1904) 9 Com. Cas. 240. (2) 2 Cowp. 565.

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on policies of insurance effected on the *Dorothy Talbot* for the Talbot Steamship Company. Some mishap occurred to the steamer and the average adjusters wrote a letter recommending the underwriters to pay 31 per cent. of the total sum insured. Some of the underwriters paid the loss, including the plaintiffs who paid 496*l.* to the defendants who as the brokers effecting the insurance collected the money payable under the policy in respect of the loss. Some of the underwriters including the Commercial Union Insurance Company however refused to pay. This fact became known to the plaintiffs within a fortnight of paying the claim—namely, on April 29. The plaintiffs' representative met the defendants' representative on the following day and they had an interview with the representative of the Commercial Union Company who refused to say why he would not pay except that charges had been made against the owners of the ship. The plaintiffs thereupon gave notice to the defendants to repay to them the 496*l.* The defendants however consistently refused to repay that sum. They justified that course for two reasons. In the first place, they said that the Talbot Steamship Company owed them a considerable sum of money for premiums; and that they had put this money which they had received from the plaintiffs to the credit of the Talbot Steamship Company and they claimed to retain the money as set off against the overdue and unpaid premiums There had however been no settled account between the parties. Ever since the decision of Lord Mansfield in *Buller* v. *Harrison* (1) it has been held that the mere passing of money in account when there is no settled account is not such a payment by an agent as will excuse him from repaying money which his principal is not entitled to retain. It would be a different matter if an agent had paid the money over to his principal without knowing that the principal was not entitled to it. In such a case the agent would be a mere conduit pipe, and the person who has paid it must look to the principal. All this is now old law, certainly 150 years old.

Mr. Wallington has however raised another point. He says

(1) 2 Cowp. 565.

that the defendants have a lien upon the money and that their position has been altered for the worse, because by giving credit to the Talbot Steamship Company to the extent of the amount received from the plaintiffs they had given up their lien; and further, that the defendants gave time to the Talbot Steamship Company for the payment of the premiums which the company owed to the defendants, and therefore the defendants could not in the circumstances be asked to repay the money. This is a point which might have been taken in many cases from 1777 down to the present time but no one has hitherto taken the point. That does not however necessarily prevent the point from being a good one, but naturally it makes one look at the point more narrowly. It is true that a broker has a lien for unpaid premiums upon moneys of the assured coming into his hands. But it must be the money of the assured and not the money of other people, and money paid under a mistake of fact, in my opinion, is not the money of the assured, and therefore a lien does not attach to it. That seems to be the simple answer to the point, and it is probably the reason why no one has ever taken the point before.

With regard to the suggestion that the defendants have altered their position for the worse, I cannot see any evidence of that having taken place. Mr. Wheeler, the manager of the defendant company, said in evidence that he might have issued a writ against the Talbot Steamship Company if he had not received this money from the plaintiffs, but I see no reason to think it was his intention to issue a writ, and it is certain that if he had issued a writ it would not have produced results which would have made it worth his while to do so. The mere fact that time was given to the Talbot Steamship Company is not sufficient. That is a point which might have been raised in very many cases of this kind during the last 150 years, and if the point is a good one it is curious that it should not have been raised during that period, or if it has been raised that no mention should have been made of it. Lord Mansfield in *Buller* v. *Harrison* (1) said this: "In this

(1) 2 Cowp. 568.

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case there was no new credit, no acceptance of new bills, no fresh goods bought or money advanced. In short, no alteration in the situation which the defendant and his principals stood in towards each other on the 20th of April." Lord Mansfield appears to have thought that in order that an agent might be able to say that he had altered his position for the worse there must be a new credit given or something of that sort. It is impossible to say that the mere giving of time—even if time were given in the present case—is like the giving of a new credit or the acceptance of new bills.

In my opinion this further point also fails.

There will therefore be a declaration that if the sum claimed was paid under the alleged mistake of fact the plaintiffs are entitled to recover it.

Solicitors for plaintiffs: *Parker, Garrett & Co.*
Solicitors for defendants: *W. & W. Stocken.*

R. F. S.

1922
Nov. 10.

MARSHALL AND SNELGROVE, LIMITED *v.* GOWER. GOWER, CLAIMANT.

Bill of Sale—Registered Bill of Sale—Subsequent deed assigning same chattels to third party as security for larger advance—"Transfer or assignment"—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *s.* 10.

In June, 1921, a bill of sale, which was duly registered, was given to secure 400*l.* with interest at 24 per cent. per annum. An agreement was afterwards made by which the present claimant agreed with the grantor of the bill of sale to pay to the grantee 450*l.* then owing thereon and to lend to the grantor a further sum of 550*l.* upon having the payment of these sums, making together 1000*l.* with interest thereon secured by a transfer of the 450*l.* then owing on the bill of sale and the securities for the same. Subsequently, in November, 1921, a deed was made between the parties to the bill of sale and the claimant, by which, in pursuance of the agreement and in consideration of 450*l.* then paid to the grantee of the bill of sale by the claimant, the grantee assigned to the claimant the principal and interest secured by the bill of sale and all

securities therefor, and the grantee also at the request of the grantor assigned to the claimant the goods comprised in the bill of sale free from all equity of redemption under the bill of sale, but subject to a proviso for redemption in the deed, and the grantor covenanted with the claimant to pay to her on a specified date the 1000*l.* with interest at 6 per cent. per annum. The latter deed was not registered as a bill of sale under the Bills of Sale Acts:—

Held, that the deed was not a "transfer or assignment" of the registered bill of sale within the meaning of the Bills of Sale Act, 1878, s. 10, but was a new bill of sale which itself required to be registered and, therefore, that the claimant was not entitled to rely upon the registered bill of sale as assignee thereof.

Horne v. *Hughes* (1881) 6 Q.B.D. 676 distinguished, but observations applied.

APPEAL from an order of Master Bonner.

An indenture, being a bill of sale, made on June 23, 1921, between John Forbes Gower, hereinafter called "the grantor," and the National Guardian Investment Company, Ld., hereinafter called "the company," witnessed that the grantor thereby assigned to the company and their assigns the furniture, goods, chattels, effects and things specifically described in the schedule thereto annexed by way of security for the payment of the principal sum of 400*l.* and interest thereon at 24 per cent. per annum, and the grantor thereby agreed that he would pay to the company the principal sum together with the interest then due by equal consecutive monthly payments of 16*l.* 4*s.* each to be paid on the 23rd day of each month. That bill of sale was duly registered as such under the Bills of Sale Acts, 1878 and 1882.

An indenture made on November 16, 1921, between the company of the first part, the grantor of the second part, and Alice Lilian Gower, spinster of the third part, expressed to be supplemental to the above bill of sale, recited that the principal sum of 394*l.* 15*s.* 2*d.* only remained owing on the bill of sale with interest amounting to 55*l.* 4*s.* 10*d.*, making together the sum of 450*l.*; and that the said A. L. Gower had agreed with the grantor to pay to the company the said sum of 450*l.*, and to lend to him the further sum of 550*l.* upon having the payment of the said principal sums of 450*l.* and 550*l.* making an aggregate principal sum of 1000*l.* with interest at the rate thereinafter mentioned secured by a

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transfer of the said sum of 394*l.* 15*s.* 2*d.* and interest and the securities for the same; and thereafter continued as follows: "Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the sum of 450*l.* now paid to the company by the said A. L. Gower (the receipt whereof the company hereby acknowledges) the company as mortgagees do hereby assign unto the said A. L. Gower All that the said principal sum of 394*l.* 15*s.* 2*d.* secured by the hereinbefore recited bill of sale as aforesaid and the interest now due and henceforth to become due for the same and the benefit of all securities for the same To hold the same unto the said A. L. Gower absolutely And this indenture also witnesseth that in further pursuance of the said agreement and for the consideration aforesaid the company as mortgagees at the request of the said John Forbes Gower do hereby assign under the said A. L. Gower All and singular the fixtures, furniture, fittings, goods, chattels, effects and premises comprised in or now subject or hereafter to become subject at law or in equity to the said bill of sale To hold the same unto the said A. L. Gower free from all equity of redemption under or by virtue of the said bill of sale but subject to the proviso for redemption hereinafter contained And this indenture also witnesseth that in further pursuance of the said agreement and for the consideration aforesaid the said J. F. Gower hereby covenants with the said A. L. Gower to pay to her on the 16th day of May next the sum of 1000*l.* with interest thereon in the meantime at the rate of 6*l.* per cent. per annum from the date of these presents. . . . . Provided always and it is hereby agreed that if the said J. F. Gower shall on the 16th day of May next pay to the said A. L. Gower the said sum of 1000*l.* with interest thereon in the meantime at the rate aforesaid the said A. L. Gower shall at any time thereafter upon the request and at the cost of the said J. F. Gower re-assign the said furniture, chattels and effects comprised in the said bill of sale to the said J. F. Gower."

Prior to the making of the above-mentioned indentures, the plaintiffs, Messrs. Marshall & Snelgrove, Ld., had brought the present action against the defendant, Mrs. K. M. Forbes

Gower, the wife of the said grantor, in the High Court for 41*l.* 6*s.* 7*d.*, as the price of goods sold and delivered, and had recovered judgment against her therein in default of appearance. Subsequently, the defendant not having satisfied the judgment, a writ of fiere facias was issued against her, under which the sheriff seized at No. 37 Belsize Park Gardens, Hampstead, the residence of the grantor and his wife, the defendant, certain of the furniture and effects which were comprised in the above-mentioned indentures. Thereupon Miss A. L. Gower (hereinafter called "the claimant"), claimed the whole of the furniture and effects seized as aforesaid.

On June 24, 1922, the sheriff accordingly took out an interpleader summons calling upon the plaintiffs and the claimant to state the nature and particulars of their respective claims. The claimant alleged that she was entitled to the goods under the bill of sale of June 23, 1921, as having been validly transferred to her by the later indenture.

On July 11, 1922, the Master heard the summons and held in effect that the claimant was not entitled to the bill of sale of June 23, 1921, as having been assigned to her by the later indenture, inasmuch as that indenture was not a "transfer or assignment" of that bill of sale within the Bills of Sale Act, 1878, s. 10 (1), but was a new bill of sale which itself required to be registered and which superseded and destroyed the original bill of sale; and he made an order thereon directing (inter alia) that the claimant should be barred from the relief which she claimed.

The claimant gave notice of appeal to the Divisional Court for an order directing that the order of the Master should be reversed in so far as it directed that the claimant should be barred, the grounds of the appeal being that the claimant was entitled to the bill of sale over the goods dated June 23, 1921, that the bill of sale was validly transferred to the claimant by the indenture of November 16, 1921, that the bill of sale was a valid security for the moneys secured

(1) The Bills of Sale Act, 1878, provides: Sect. 10: . . . . A transfer or assignment of a registered bill of sale need not be registered."

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thereby, and that the Master was wrong in holding that the bill of sale was destroyed by the later indenture.

J. W. F. Beaumont for the claimant, appellant. The deed of November 16, 1921, in so far as it deals with the debt for which and the chattels over which the bill of sale was given, is a "transfer or assignment" of that bill of sale from the company to the claimant within the meaning of the Bills of Sale Act, 1878, s. 10 (1), and is not itself a new bill of sale, which required to be registered, and which superseded and destroyed the original bill of sale. The deed is in form a transfer or assignment of a bill of sale. It is in the usual and proper form of a transfer or assignment of a bill of sale. It expressly states that the company "assign" to the claimant the amount due on the bill of sale and the security therefor. The Bills of Sale Acts do not require that a transfer or assignment of a bill of sale should be in any particular form. The deed is not and does not purport to be in the form of a bill of sale. The deed is in substance a transfer or assignment of a bill of sale. It does not destroy or invalidate the bill of sale and create a new security in its place, but transfers it, substituting the claimant for the company as mortgagee, and conferring upon her all the rights of the company as against the mortgagor. The provision in the deed that the goods are assigned free from the equity of redemption in the bill of sale is immaterial and irrelevant. The deed continued the relationship of mortgagor and mortgagee created by the bill of sale, merely substituting the claimant for the company as mortgagee, and so long as the relationship of mortgagor and mortgagee continues, the mortgagor's equity of redemption cannot be got rid of. Moreover, the deed contains an express proviso for redemption on payment of the sum secured by the deed which includes the sum secured by the bill of sale. The fact that the deed was given for a larger sum than that for which the bill of sale was given does not prevent it from being a valid transfer or assignment of the bill of sale, because the claimant does

(1) See note (1) ante, p. 359.

not claim in respect of the bill of sale a greater sum than that for which it was registered, and the creditors of the grantor cannot therefore be prejudiced. Neither can the fact that the deed contains a fresh covenant for payment prevent it from being a transfer of the bill of sale and make it a new bill of sale. The case of *Horne* v. *Hughes* (1) is a direct authority for the view that the deed is a transfer or assignment and not a bill of sale. That case was no doubt decided before the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), came into force, but that Act made no alteration in the law relating to the transfer or assignment of a bill of sale.

Manning K.C. (*P. B. Morle* with him) for the plaintiffs, respondents. The deed of November 16, 1921, is not a transfer or assignment of the original bill of sale, within the meaning of s. 10 of the Bills of Sale Act, 1878, but a new bill of sale which requires to be registered, and which supersedes the original bill of sale. In order to be a transfer or assignment of a bill of sale a deed must be made for a sum equal to the debt secured by the bill of sale; but the deed in question assigns to the claimant the chattels comprised in the bill of sale for a sum more than twice as great as the debt secured by the original bill of sale. The deed assigns the chattels "free from all equity of redemption under or by virtue of the said bill of sale but subject to the proviso for redemption hereinafter contained," and is thus by its express terms not a transfer of the old bill of sale but a new bill of sale. The deed in fact involves two distinct transactions—namely, the discharge of the old security and the creation of a new security. Although a deed which is given subsequently to an existing mortgage creating a new equity of redemption and giving new powers may be chargeable with stamp duty as a transfer only, it nevertheless constitutes in effect a new mortgage: see Key and Elphinstone's Precedents in Conveyancing, 9th ed., vol. ii., p. 232, note (*a*). The case of *Horne* v. *Hughes* (1) is distinguishable, for there the amount remaining unpaid on

(1) 6 Q. B. D. 676.

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the old bill of sale and the fresh advance were together substantially equal to the amount for which the original bill of sale was given, and therefore the new deed could properly be regarded as a transfer of the original bill of sale and not a new bill of sale. Further, in that case the new deed did not release the old equity of redemption, but assigned the chattels subject thereto. If that case had been decided after the Act of 1882 came into force, the deed would have been held to be a bill of sale which was invalid both on the ground that it was not in the proper form and also as being unregistered.

Beaumont replied.

AVORY J. In my opinion the Master was right in holding that the claimant was barred. The question is whether or not the deed of November 16, 1921, was a "transfer or assignment" of a registered bill of sale within the meaning of s. 10 of the Bills of Sale Act, 1878. If it was, it did not require to be registered under the Bills of Sale Acts. In my opinion it cannot be properly described as a transfer or assignment of a bill of sale. It was in effect a new and different bill of sale and required itself to be registered. I do not think that the case of *Horne* v. *Hughes* (1) is by any means conclusive to show that this view is wrong. On the contrary I find that it is an authority for the respondent in the present case. It appears from the judgment of Watkin Williams J. in the Divisional Court in that case that there the new deed of February 20, 1880, was found to be for "a further sum, which with the expenses would bring up the amount then advanced by Horne substantially to the same amount as that originally secured by the bill of sale." In the argument in the Divisional Court the similarity of the amounts for which the deeds were given was the point mainly relied upon on behalf of the plaintiff. Mr. Charles Q.C. for the plaintiff said (2): "The maximum amount secured by the mortgage was substantially unaltered by the transfer, so that other creditors of the mortgagor

(1) 6 Q. B. D. 682. (2) Ibid. 680, 681, 683.

could not be prejudiced by it." Mr. Edward Pollock for the defendant said that "by a transfer was intended merely a handing over of the same security from one person to another, and that here there were substantial variations, and among other things an alteration of the amount secured, the plaintiff getting security for the sums of 113*l.* and 40*l.*, over and above the sum at that time secured by the prior bill of sale." Watkin Williams J., in delivering the judgment of the Divisional Court, said: "This appears to us to be in substance, as well as in strict form, a transfer of the bill of sale within the meaning of s. 10 of the Act. Had it been attempted under the colour of a transfer and assignment of the existing mortgage to have extended the security and to have made it available for a larger advance than that for which the original mortgage had been given, such a transaction would not, in our opinion, have been a transfer of a duly registered bill of sale within the meaning of the tenth section of the Act, but substantially a new bill of sale which would have required registration under the Act." The Court of Appeal, I think, agreed with that. The defendant appealed to the Court of Appeal, and that Court heard argument on his behalf but did not call upon the plaintiff's counsel. The Court of Appeal, I think, agreed with the view which had been expressed in the Divisional Court. They were of opinion "that the effect of the deed was to transfer the former security for 348*l.* 7*s.* 4*d.* on it, and that such a transfer being valid without registration the plaintiff was entitled to the goods, and that it was not necessary to determine whether he had a right to hold them as security for any larger sum than 348*l.* 7*s.* 4*d.*, since he was at all events entitled to hold them as security for that sum." That case is an authority for the proposition that the deed here in question looked at as a whole is not a transfer or assignment of the original bill of sale, but a new bill of sale which itself required registration. It follows that the claimant is not entitled to rely upon the original bill of sale as having been validly transferred to her, and that her claim is therefore barred.

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SALTER J. I agree. The document dated November 16, 1921, was not a transfer or assignment of the rights and liabilities of the company as grantee under the bill of sale of June 23, 1921. Miss A. L. Gower, the claimant, as grantee under the later document, does not stand in the same position in regard to Mr. Forbes Gower, the grantor, as that which the company as grantees under the original bill of sale occupied in regard to him. The true position is that Mr. Forbes Gower by means of a larger sum of money borrowed from the claimant, his sister, paid off the debt owing by him to the company and thus redeemed the original bill of sale and released the chattels therefrom, and at the same time by the later document he in effect made an assignment of the chattels to the claimant as security for the larger loan which he had obtained from her. The later document is not a transfer or assignment of the original bill of sale, but is itself a bill of sale, and as it is not registered it is invalid.

Appeal dismissed.

Solicitors for plaintiffs: *Boyce & Evans.*
Solicitors for claimant: *Beaumont & Son.*

J. R.

THE KING *v.* THE JUDGE OF THE MARYLEBONE COUNTY COURT.

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Dec. 4, 19.

Landlord and Tenant—Standard Rent—Apportionment—Application to County Court—Jurisdiction—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 3.

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 3, requires the county court to apportion the rent or rateable value of a dwelling house in every case shown to fall within its provisions, whether the matter comes before it as a sole and independent question or otherwise.

Broomhall v. *Property Agents and Owners, Ld.* [1922] 1 K. B. 311 distinguished.

RULE NISI for certiorari to the judge of Marylebone County Court.

The applicant Alfred Boon was the tenant of three rooms on the ground floor of a dwelling house No. 94 Hillfield Way, West Hampstead, in the county of London, for which he paid a weekly rent of 19*s.* 4½*d.* The respondent was the landlord of the whole house, of which the standard rent was 48*l.* and the rateable value 42*l.* a year. The applicant had applied to the county court for apportionment under the Increase of Rent, &c., Act, 1920, but the judge had refused the application being of opinion (1.) that the case of *Broomhall* v. *Property Agents and Owners* (1) applied; (2.) that s. 12, sub-s. 3, of the Act only empowered the Court to hear applications for apportionment when it was necessary to do so for the purpose of determining the standard rent or rateable value of a dwelling house forming part of a property to which the Act applied (2); (3.) that to construe s. 12, sub-s. 3, as enabling the Court to determine on an originating application the

(1) [1922] 1 K. B. 311.

(2) Increase of Rent, &c., Act, 1920, s. 12, sub-s. 3: "Where, for the purpose of determining the standard rent or rateable value of any dwelling house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling house shall be final and conclusive."

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standard rent of part of a house, when it was unable to do so as to the whole house, would be absurd and that that sub-section only applied to cases where some action or matter was pending on which a question arose as to the standard rent of the part, whereupon the Court might determine the matter by apportioning the standard rent of the whole house.

A rule nisi was obtained by the applicant, calling on the county court judge to hear and determine the matter according to the Increase of Rent, &c., Act, 1920, s. 12, sub-s. 3, on the ground that he had jurisdiction thereunder to apportion.

The rule nisi now came on for argument.

Mark Goodman showed cause. The county court judge has no jurisdiction to hear an application to determine as an independent question what is the "standard rent" of a dwelling house either under the Increase of Rent, &c., Act, 1920, or under the rules made under the Act: *Broomhall* v. *Property Agents and Owners.* (1) The same principle applies here; in *Broomhall's Case* Horridge J. said: "If, therefore, in the present case there was any question as to the amount by which the increased rent might exceed the standard rent the county court judge would clearly have jurisdiction to decide it; but no question as to increased rent is here raised."

[SALTER J. *Broomhall's Case* only decides that while disputes under s. 2, sub-ss. 1, 2 and 3, may be settled by the county court, there was no "dispute" before the Court in that case.]

There must be some substantive litigation before the Court can grant relief.

O'Malley in support of the rule. The county court has jurisdiction to ascertain the standard rent of part of a house by means of apportionment under s. 12, sub-s. 3. *Broomhall's Case* (1) is distinguishable, for there no question of apportionment arose, but merely questions under s. 2,

(1) [1922] 1 K. B. 311, 316.

sub-ss. 1 and 6, of the Act as to the standard rent of a dwelling house.

In *Woodward* v. *Samuels* (1) it was decided that either the landlord or the tenant could apply for apportionment. In *Sinclair* v. *Powell* (2) Atkin L.J. discussed the possibility of a landlord shutting part of a house and letting the house so altered at an unrestricted rent. He said: "It appears to me that so easy a means of evading the Act was foreseen by the Legislature, and provided for by the apportionment clause, and that *Woodward* v. *Samuels* (1) was rightly decided."

The Statutory Rules made under s. 17 of the Act of 1920 support the applicant's contention as to the jurisdiction of the county court, as also do the statutory forms.

[He referred to Rules 1 (*b*), 3 (5.), and 11 (*b*), and Forms V. and VI.]

[LORD HEWART C.J. In this case we all think that the rule must be made absolute, but a considered judgment will be delivered later.]

Dec. 19. The judgment of the Court (Lord Hewart C.J., Darling and Salter JJ.) was delivered by

SALTER J. This was an application to the county court for apportionment made by the tenant under s. 12, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The county court judge decided that he had no jurisdiction. Cause is now shown against a rule nisi directing him to hear and determine the application.

No. 94 Hillfield Way, West Hampstead, was let as a whole on August 3, 1914. Since July, 1919, the applicant has been the tenant of three rooms in that house. In August, 1922, he applied to the county court to make an apportionment of the rent of 94 Hillfield Way, as on August 3, 1914, for the purpose of determining the standard rent of his rooms. The judge did not enter into any inquiry whether the applicant's dwelling house is within the Act, or whether apportionment is necessary for the purpose of

(1) (1920) W. N. 82; 89 L. J. (K. B.) 689.
(2) [1922] 1 K. B. 393, 407.

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determining the standard rent of it. The facts being before him, he inquired whether any other proceedings under the Act were pending between the parties, and receiving a reply in the negative he decided, with regret, on the authority of *Broomhall* v. *Property Agents and Owners* (1), that he had no jurisdiction to entertain the application. The question is whether he was right in law in so deciding.

The words of s. 12, sub-s. 3, appear to be plain. Sect. 12, sub-s. 1 (*a*), lays down the rule for determining the standard rent of every dwelling house. It is the actual rent of that dwelling house at a fixed date. Sub-s. 2 then provides that a room or rooms in a house may be a dwelling house within the meaning of the Act, and a dwelling house to which the Act applies. It follows that there may be cases, and there are many, where the standard rent of the rooms must be determined by ascertaining the actual rent of the rooms at a date when those rooms were not let separately, but were let as part of a whole. This can only be done by apportionment. Sub-s. 3 therefore follows, and empowers the county court to make a binding apportionment. The application may be made by the landlord or tenant, and the jurisdiction is given subject to two conditions only. The applicant must prove that the dwelling house, the subject of tenancy between the parties, is within the Act, and that it is necessary for the purpose of determining the standard rent of that dwelling house to make an apportionment, at the appropriate date, of the rent of the property in which that dwelling house is comprised. If these two things are proved, jurisdiction to make the apportionment is given in plain terms. The Statutory Rules and Forms support this view: see rr. 1 (*b*), 3 (5.), 11 (*b*), 17 (1), and Forms V. and VI.

Under s. 11 of the Act the tenant is entitled to require of the landlord a written statement of the standard rent. The landlord is bound to answer, and to answer truly under a penalty unless he has a reasonable excuse. If the tenant of a room, the standard rent of which can only be ascertained by apportionment, applies to the landlord under s. 11, it is

(1) [1922] 1 K. B. 311.

plain that the landlord cannot give the information demanded unless he can obtain apportionment by the county court. There is no dispute between the parties. If the county court has no jurisdiction to apportion, the landlord obviously has a reasonable excuse, and the section is useless to the tenant in those cases in which he needs it most. If on the other hand the county court has jurisdiction when the landlord applies, it is unarguable that it has no jurisdiction when the tenant applies.

The decision in *Broomhall* v. *Property Agents and Owners* (1) is in no way inconsistent with this construction of s. 12, sub-s. 3. In that case there was no application for apportionment, and no question of apportionment arose or could arise. The flat was let on August 3, 1914, at a rent of 47*l.* 2*s.* a year. This tenancy having been determined, the flat was let to the applicant in November, 1920, at a rent of 105*l.* a year. A dispute arose between the landlord and the tenant whether the standard rent of the flat should be based on its actual rent in 1914, or on its actual rent in 1920. The tenant applied to the county court to fix the standard rent of the flat. In effect, he applied for advice whether the case fell within the first or third of the three classes defined by s. 12, sub-s. 1 (*a*). The jurisdiction of the Court being challenged it was clear that s. 12, sub-s. 3, could not be invoked, and the point argued was whether s. 2, sub-ss. 1 and 6, gave jurisdiction. It was held that they did not. This decision does not touch the construction of s. 12, sub-s. 3. It is true that an apportionment under s. 12, sub-s. 3, has the effect of determining the standard rent, but this does not limit the power of the Court to make an apportionment in all cases within that sub-section.

For the purpose of this judgment it has been necessary to assume that the applicant's rooms are within the Act, and that apportionment is necessary to determine their standard rent. Whether these points are established or not the county court judge will determine in due course. If they are established, he has jurisdiction to make an apportionment.

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Sect. 12, sub-s. 3, not only empowers, but requires the county court to make an apportionment in every case shown to fall within its provisions. The rule must therefore be made absolute.

Rule absolute.

Solicitor for applicant: *W. H. Thompson.*

Solicitors for respondent: *Soames James & Co.*

F. P. F.

C. A

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[IN THE COURT OF APPEAL.]

DAVIS *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income Tax—Super Tax—Allowances and Deductions—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *ss.* 4, 5, 27—*Finance Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *ss.* 15, 16, 17, 18.

The allowances and deductions granted for income tax purposes by the Finance Act, 1920, ss. 16, 17 and 18, do not apply to super tax and are not to be allowed in computing income for super tax purposes.

Where the income of an individual included a pension upon which a sum was payable as income tax under the Income Tax Act, 1918, Sch. E, r. 1:—

Held, that the sum so paid was not to be deducted in calculating the amount of pension liable to super tax. The words "the income of any individual" in the Income Tax Act, 1918, s. 4, mean his "total income from all sources"; and in computing his income for super tax purposes an individual is not entitled to deduct the whole of the income tax paid by him under all schedules.

Decision of Sankey J. [1922] 2 K. B. 805 affirmed.

APPEAL from the decision of Sankey J. (1) upon a case stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at York House, Kingsway, London, on January 14, 1922, Mr. S. Kennard Davis, of Heathmere, Roehampton Park, London (the present appellant), appealed against an assessment of 6001*l.* made upon

(1) [1922] 2 K. B. 805.

him to super tax for the year ending April 5, 1922, under the provisions of the Income Tax Acts relating to super tax.

The assessment in question was made up as follows by reference to the appellant's income for the previous year as assessed to income tax :—

	£	s.	d.
Pension	900	0	0
Annual value of residence	150	0	0
Income received under deduction of income tax	3527	13	9
Wife's income received under deduction of income tax	1423	12	4

The above pension was assessed to income tax for the year 1920–21 in the sum of 900*l.*, the tax payable thereon amounting to 270*l.*, such tax being reckoned at the standard rate of tax—namely, 6*s.* in the pound. Subsequently a claim was made by the appellant that for the year ending April 5, 1921, he was entitled to the allowances and deductions specified in ss. 16, 17 and 18 of the Finance Act, 1920. This claim was given effect to by reducing the duty payable in respect of the above income tax assessment by 128*l.* 5*s.* to 141*l.* 15*s.* Such sum of 128*l.* 5*s.* was arrived at as follows :—

	£	s.	d.
Earned income allowance (being 1/10th of the earned income 90*l.* at 6*s.*)	27	0	0
Personal allowance 225*l.* at 6*s.*, ...	67	10	0
Reduced rate of tax on first 225*l.* of taxable income 225*l.* at 3*s.*	33	15	0
	£128	5	0

The personal allowance of 225*l.* was granted, as the appellant was during the year ended April 5, 1921, and at all material times, a married man having his wife living with him.

A copy of the assessor's certificate of assessments (which was attached to the special case) showed the "net income chargeable" under "Schedule E" as 900*l.*, and the allowance "at half standard rate" as "225*l.* By Schedule." At the hearing of the appeal before the Commissioners, counsel on

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behalf of the appellant contended (inter alia) that the allowance of 225*l.* granted by the Finance Act, 1920, s. 17, and s. 18, sub-s. 1, for income tax was also to be allowed for super tax, and that super tax, being an additional duty of income tax, was not chargeable in respect of a larger income than the income liable to income tax; that the super tax charged by the Income Tax Act, 1918, s. 4, the Finance Act, 1920, s. 15, sub-ss. 1 and 2, and the Finance Act, 1921, s. 24, sub-s. 2, was charged on an individual in respect of his income when his income from all sources exceeded 2000*l.* at the rate and in accordance with the provisions of the Finance Act, 1920, s. 15, sub-ss. 1 and 2, and that super tax was not charged on the total income of an individual by the Income Tax Act, 1918, s. 5, or otherwise on what is taken to be the total income under that section; that the Income Tax Act, 1918, s. 5, was not a charging section, but a section which directs that certain deductions should be made in estimating total income and which defines the occasions on which a liability to super tax may arise; that inasmuch as the allowance had been made for income tax, the effect of the Income Tax Act, 1918, s. 16, and s. 5, sub-s. 2, taken together, was to restrict the super-tax assessment to the income as reduced for income tax purposes; that the income tax ought to be deducted in calculating the amount of income liable to super tax, or alternatively that the income tax payable under the Income Tax Act, 1918, Sch. E, r. 1, in respect of the pension income must be deducted in calculating the amount of pension income liable to super tax.

On behalf of the Commissioners of Inland Revenue it was contended (inter alia) that in computing the total income for super tax purposes, the sum of 225*l.* allowed for income tax purposes under the Finance Act, 1920, s. 18, sub-s. 1, was not an allowable deduction; that the assessment appealed against had been rightly made in the sum of 6001*l.*

The Commissioners who heard the appeal upheld the contentions of the respondents and confirmed the assessment. At the appellant's request they stated this case for the opinion of the High Court.

Sankey J. upon the hearing of the case affirmed the decision of the Commissioners.

From this decision Mr. Kennard Davis appealed.

The appeal was heard on November 20, 1922.

Sir J. Simon K.C., *Latter K.C.* and *Cyril King* for the appellants.

Douglas Hogg K.C. (*A.-G.*) and *R. P. Hills* for the Crown.

[The arguments used in the Court below were substantially repeated. They further appear from the judgments of the Court of Appeal. Upon the point which, before Sankey J., was treated as concluded by the decision in *Samuel* v. *Inland Revenue Commissioners* (1)—namely, whether, for the purposes of super tax, the appellant was entitled to have deducted the whole of the income tax paid by him under all schedules, the following cases were cited: *Inland Revenue Commissioners* v. *Blott* (2); *Ashton Gas Co.* v. *Attorney-General* (3); and *Brooke* v. *Inland Revenue Commissioners* (4); *Patent Castings Syndicate* v. *Etherington.* (5)]

1922. Nov. 21. LORD STERNDALE M.R. This is an appeal from the decision of Sankey J. on a question with regard to super tax, and the income upon or in respect of which that tax is to be charged. The actual question is whether the personal allowances or deductions which are authorized by the Finance Act, 1920, for income tax purposes, are to be allowed or deducted from the income before the taxpayer is charged in respect of it with super tax.

I think we have to approach this matter with this fact in mind: that super tax is an additional income tax. In that sense it is not a separate tax. It has been so held in several cases; indeed it appears perfectly clearly from the statute which imposes super tax. But if it be sought to deduce from that this proposition, that therefore all provisions with regard to income tax or super tax are to be considered as common

(1) [1918] 2 K. B. 553.
(2) [1921] 2 A. C. 171.
(3) [1906] A. C. 10.
(4) [1918] 1 K. B. 257.
(5) [1919] 1 Ch. 306.

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to them both, there is no foundation for such a deduction. I do not think it was argued, and I do not think it could be argued directly, but I cannot help thinking that such a deduction underlies the arguments that were addressed to us. It is only necessary to look at the Acts to see that it is not the case, and that there are provisions which apply to super tax and not to income tax, though there may be provisions which apply to both. The Part of the Income Tax Act, 1918, with which we shall have to deal is headed "Part II., Super-Tax," Part I. being headed "Charge of Income Tax," showing quite clearly that the provisions of the one and of the other are not interchangeable.

Part II. of the Act commences with s. 4, which provides that: "In addition to the income tax charged at the rate prescribed for any year, there shall be charged, levied, and paid for that year in respect of the income of any individual, the total of which from all sources exceeds two thousand five hundred pounds, an additional duty of income tax (in this Act referred to as super tax) at the rate or rates prescribed by Parliament for that year."

Then s. 5, sub-s. 1, provides for the way in which the income is to be estimated for the purpose of super tax. [The Master of the Rolls read the sub-section and continued:] Sect. 27 provides for a declaration that has to be made by any person who claims exemption, abatement or relief under the provisions of that part of the Act, and Sch. 5, para. XVII., gives the substance of what is to be contained in the declaration that has to be made.

The exemptions or abatements under that Act were exemptions or abatements in respect of the amount of income. Up to a certain amount incomes were exempted altogether; up to other amounts abatements were made from the amount in respect of which tax had to be paid. All those provisions, whether of exemption or abatement, were swept away by the Finance Act, 1920, and instead, certain deductions or allowances—sometimes they are called one and sometimes the other, possibly there is meant to be a distinction between them—are provided by ss. 16–22 of the Act.

It became necessary, therefore, as the exemptions or abatements in the Act of 1918 were abolished and something substituted in their place, to make the following amendment in s. 5, sub-s. 1: "For the words 'estimated for the purposes of exemption or abatement under this Act' there shall be substituted the words 'required to be estimated in a return made in connection with any claim for a deduction from assessable income.'" The Act still distinguishes assessable income and taxable income; taxable income in respect of income tax being the assessable income less whatever deductions the taxpayer shows himself to be entitled to. The result of that is that s. 5, sub-s. 1, now runs in this way: "For the purposes of super tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is required to be estimated in a return made in connection with any claim for a deduction from assessable income."

Now that return is to be made for the purpose of obtaining the deduction. Until the return has been made and the claim for deduction has been approved no deduction can be made; and it seems to me the most obvious contradiction in terms to say that a return of income estimated in that manner can possibly be made subject to deductions which have not been allowed, and to claim which the return has been made. I should have thought that, apart from one or two other matters, to which I shall refer in a moment, that was abundantly clear.

I agree with the learned judge that "the total income" in s. 5 is "the income" which is mentioned in s. 4 with what he calls, I think, an adjectival suffix, which qualifies it. It is contended further that all the section says is that super tax shall be paid "in respect of" the income of any individual, and that that does not mean that the tax is to be paid upon that income, or in other words to be measured by the amount of that income, but only in respect of that income, in this sense that you must have regard to the income in order to see whether the individual is brought within the class of the super taxed. But even if this were the first time the expression

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had been used, it does seem to me a most unnatural construction of the words. This, however, is by no means the first time the words "in respect of" have been used in the Income Tax Acts. They are used in the Act of 1842 as having the same effect as the word "on." And in the Act of 1853 the words are used really as interchangeable with "on," because the short title speaks of the tax being charged "upon" or "on," and the enacting part uses the words "in respect of," showing that there was no intention of making any difference between the two expressions. Probably the reason that "in respect of" is used is because the tax is not charged upon the income. There is no doubt when it is deducted at the source the effect is practically the same as if it were charged upon the income; but that is done by special provisions, and it is not charged upon the income; it is charged upon the individual in respect of his income in this sense, that on his income is measured the amount of the tax which he has to pay; that is to all intents and purposes what the ordinary man calls being charged on the income. Probably "in respect of" is a more accurate expression, but that is what it means, and I cannot follow the argument that it is merely used to show whether the person comes within the class of those who are liable to super tax or not, and then you have, apart from the income altogether, to find some income in respect of which or upon which he has to pay. That I should have thought was abundantly clear.

But there are one or two other sections upon which great stress has been laid. I will deal first with s. 15, sub-s. 4, of the Act of 1920. Sect. 14 keeps alive all enactments with regard to income tax, and contains some other provisions. Sect. 15 enacts that "super tax shall be charged in respect of the income of any individual the total of which from all sources exceeds two thousand pounds, and Part II. of the Income Tax Act, 1918, shall have effect accordingly." Sub-s. 2 deals with super tax. Then follow the rates. Sub-s. 3 contains a similar provision to that of s. 14 with regard to income tax, keeping alive the enactments as to super tax. Then sub-s. 4 provides: "In estimating the total income of

any individual for the purpose of super tax, the amount of any earned income shall be taken to be the full amount of that income without the deduction of any allowance under this part of this Act, and s. 5 of the Income Tax Act, 1918, shall have effect accordingly." Sect. 16 of the Act of 1920 provides for a deduction or allowance in respect of earned income: "For the purpose of ascertaining the amount of the assessable income of an individual for the purpose of income tax, there shall be allowed in the case of earned income a deduction from the amount of that income as estimated in accordance with the provisions of the Income Tax Acts of a sum equal to one-tenth of the amount of that income, but not exceeding in the case of any individual two hundred pounds."

The argument as I follow it upon sub-s. 4 of s. 15 is this. But for sub-s. 4 the taxpayer would under s. 16 have a right to a deduction or allowance of one-tenth of his earned income. Sub-s. 4 provides that in returning his total income for super tax he shall not be entitled to that one-tenth deduction but he must return his earned income in full. Now this is the argument which I find it so difficult to follow. Although nothing existed at the time of that sub-section which would give any pretence for saying that the other personal allowances were to be deducted in arriving at the total income for super tax, they must be so deducted because it has not been said that they were not to be. I can quite understand that if prima facie a number of deductions were to be taken into account, or if there were reasonable doubt as to whether they were to be taken into account or not, the exclusion of one of them might be of value in showing that the others were not to be excluded, or must be taken into account. But where, before the passing of such a sub-section, it is, as in this case, clear that no such deductions could possibly be made in estimating the total income, for the reason that I have given—namely, that the estimate is to be the same as that which is required for the purpose of claiming deductions, and that to make the deductions first would be to make them before they had been allowed, it seems to me therefore abundantly clear that they were not included, and whatever the reason

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for putting in sub-s. 4, whether there were or were not a good reason for it, it is, to my mind, impossible to say that that sub-section introduces, I may say by implication, a positive enactment that the deductions, which clearly were not to be taken into account before, are now to be taken into account. I do not stop to consider whether there is not a perfectly intelligible reason, entirely consistent with what I am saying, for putting in sub-s. 4, I think there is. If I may say so, I do not quite understand, and therefore I cannot say, whether I agree or not with the explanation given by the learned judge in the Court below with regard to sub-s. 4. I think in all probability the true explanation of it is that suggested by Warrington L.J. in the course of the argument. But whatever the explanation, or if there be no explanation at all, it seems to me for the reasons that I have given that that sub-section cannot possibly have the effect which it is argued that it has in this case.

I now come to sub-s. 2 of s. 5 of the Act of 1918, which it was strenuously argued has the effect of bringing in all these deductions, for this reason, that they have to be taken into account in arriving at an assessment of income tax, and as that assessment is made conclusive also for super tax, therefore that imports that these deductions must be brought in for the purpose of super tax also. It is a somewhat attractive argument, but I do not think it is well founded. It is the only one that has caused me any trouble in the matter. The sub-section enacts: "Where an assessment to income tax has become final and conclusive for the purposes of income tax for any year, the assessment shall also be final and conclusive in estimating total income from all sources for the purposes of super tax for the following year, and no allowance or adjustment of liability on the ground of diminution of income or loss shall be taken into account in estimating the total income from all sources, unless that allowance or adjustment has been previously made in respect of income tax on an application under the special provisions of this Act relating thereto." As now amended, that reproduces, with the necessary amendments, s. 18 of the Finance Act, 1915. The history of that

section reproduced by s. 5, sub-s. 2, shows, as I think the section itself on the face of it does, that it does not apply to deductions of this class at all, and is dealing with a totally different subject-matter—namely, an allowance or adjustment of liability on the ground of diminution of income or loss. Properly looked at, in my opinion, sub-s. 2 has no effect in bringing in these deductions; and I think the argument which was based upon it rather loses sight of the difference that was made in the Act of 1920 between assessable income and taxable income. But however that may be, in my opinion, for the reasons I have given, that sub-section does not affect the matter. Therefore I think there is no foundation whatever for the contention that these deductions are to be taken into account in arriving at the income for super tax; and I also think that the words "in respect of" mean that you are to take the total income, and act on that, not because super tax is charged on it, but as regulating the amount that has to be paid by the taxpayer.

There is another subsidiary point, although a very important one if it could be made good, on which not a great deal was said, I think because it was felt it was hardly arguable. That is, that in arriving at this total income you are to deduct the income tax that has already been paid. The foundation for that argument seems to be r. 1, applicable to Sch. E: "Tax under this schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this schedule, or to whom any annuity, pension or stipend, as described in this schedule, is payable"—that applies in this case to the amount of income which is attributable to pension and not to the rest—"in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, except as otherwise provided, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament." It is argued that the expression "any Act of Parliament" includes this same Act of Parliament. This same Act of Parliament imposed an income tax in respect of the income, and before arriving at the income you are to deduct the

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tax. As I say not a great deal was made of that argument. The point really only needs to be stated to show that it is unarguable; and as a general proposition applying not only to the pension but to the whole of the income—namely that in arriving at the total income for super tax you must deduct all that has already been paid in respect of income tax, I think it is even worse. The point, as I say, was not very seriously argued and need not be treated at greater length. I think the appeal fails on both points and should be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The principal question which we have to determine is whether in ascertaining the amount of income in respect of which the taxpayer is to be charged with super tax, he is entitled to have deducted the personal allowances to which he is entitled for the purpose of income tax by virtue of the Finance Act, 1920. There are two subsidiary points, although they are of even greater importance to the taxpayer, if they can be established. Those are, first, whether the taxpayer is entitled in ascertaining the amount of his income for the purposes of super tax, to have the income tax deducted; then there is a point subsidiary to that, whether in the particular case, the taxpayer being entitled to a pension, he can have the income tax in respect of that pension deducted before ascertaining the total amount of his income.

With regard to the first point, the substantial argument adduced for the appellant was this. He said before the Act of 1920 the mode in which certain taxpayers were relieved was by means of abatements and exemptions; that those abatements and exemptions could be claimed only by persons of small incomes, the outside limit to which any of these applied being incomes of 800*l.*; and consequently those exemptions and abatements had no effect at all for the purposes of super tax, which applied only to incomes of much larger amount. Then he said the Act of 1920 effected an entire revolution in the matter of both income tax and super tax, introducing, as it did for the first time, the conception

of taxable income as distinct from assessable income; and that when it introduced the conception of taxable income, it meant that that income and that alone should be subject to any tax falling upon or charged in respect of income, and that inasmuch as super tax is an income tax (it is so described in the Act by which it is imposed) therefore that, as well as the income tax, was affected by the conception of taxable income, and that it was only the taxable income which was liable to that tax.

That is, if I may venture to say so, a most attractive argument, and if only it could be supported when the details of the statutory provisions are examined it would no doubt confer a great benefit upon the taxpayer. But, in my judgment, when the statutory provisions are considered they do not support that argument.

I shall endeavour to substantiate that view by reference to the statutes relating to the matter. I think it will make the reasoning clearer if I refer first, not to the Income Tax Act, 1918, but to the Finance Act, 1920, which, it is said, effected a revolution in the income tax law. By that Act the whole of the provisions of the Income Tax Act, 1918, relating to abatements and exemptions were repealed absolutely, and certain minor amendments were made in the provisions of that Act to make them fit the system of allowances and deductions introduced by the Finance Act, 1920, in place of exemptions and abatements. The important part of the Act is that which is contained in Part II., beginning at s. 14. I need not read s. 14; it has really no bearing upon the present question; it merely relates to the rate of income tax for the year, and provisions of that kind. Sect. 15, sub-s. 1, provides: "Super tax shall be charged in respect of the income of any individual the total of which from all sources exceeds two thousand pounds, and Part II. of the Income Tax Act, 1918, shall have effect accordingly." It will be observed that the super tax is charged in respect of the income of any individual the total of which exceeds the sum mentioned. We shall see presently what is meant, as I think, by "the income" in that sub-section. Then

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sub-s. 2 relates only to the rates, and is unimportant for the present purpose, as is also sub-s. 3.

Sub-s. 4 was the foundation of an argument which I will deal with more particularly presently. The sub-section provides: "In estimating the total income of any individual for the purpose of super tax, the amount of any earned income shall be taken to be the full amount of that income without the deduction of any allowance under this part of this Act, and s. 5 of the Income Tax Act, 1918, shall have effect accordingly." In passing I think I may say that in construing that reference to s. 5 of the Income Tax Act, 1918, it must mean s. 5 as amended by the present Act. We shall see presently what the amendment was.

Then s. 16 gives the allowance in respect of earned income. It is in these terms: "For the purpose of ascertaining the amount of the assessable income of an individual for the purpose of income tax, there shall be allowed in the case of earned income a deduction from the amount of that income as estimated in accordance with the provisions of the Income Tax Acts of a sum equal to one-tenth of the amount of that income, but not exceeding in the case of any individual two hundred pounds." Sect. 17 relates to what has been called the personal allowance: "(1.) An individual who, in the manner prescribed by the Income Tax Acts, makes a claim in that behalf and who makes a return in the prescribed form of his total income shall be entitled for the purpose of ascertaining the amount of the income on which he is to be charged to income tax (in this Act referred to as 'the taxable income') to have such deductions as are specified in the five sections of this Act next following made from his assessable income." I pause for one moment to point out that the deductions are to be made from the assessable income and they are made for the purpose of ascertaining from the assessable income what is the amount of the taxable income. I need not go through the allowances; the only one that is important for the present case is what is popularly known, and is referred to in the marginal note of the statute, as the personal allowance.

Then the former exemptions and abatements having been swept away by that Act, certain minor amendments had to be made. Those are specified in the Third Schedule. The important one is that which is made in s. 5, to which I have already alluded, and another is in reference to the Fifth Schedule of the Income Tax Act, para. XVII., where the amendment specified in the Third Schedule is in these terms: "A reference to any allowance or deduction shall be substituted for the reference to any exemption, abatement, or relief, dependent on total income."

I now return to the Income Tax Act, 1918, and I think it will be convenient to read that Act as amended by the Third Schedule to the Act of 1920 in order to make the matter clear. The material part for the present purpose is Part II., which relates to super tax. Sect. 4 provides: "In addition to the income tax charged at the rate prescribed for any year, there shall be charged, levied, and paid for that year in respect of the income of any individual, the total of which from all sources exceeds two thousand pounds" (as it is now in the Act of 1920) "an additional duty of income tax (in this Act referred to as super tax) at the rate or rates prescribed by Parliament for that year." Super tax then is a charge in respect of the income of an individual the total of which exceeds a certain sum. I think the use of the words "in respect of" are of no importance at all, neither to income tax nor to super tax; they are payable in respect of, and the actual amount of it is ascertained by reference to, the income. Therefore the words "in respect of," as I understand, are perfectly accurate words to use. Sect. 5 is, I think, the section on which the question really turns. Sub-s. 1 of that section (read as amended by the Third Schedule of the Act of 1920) says: "For the purposes of super tax, the total income"—it is the total income in respect of which the super tax is charged—"of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is required to be estimated in a return made in connection with any claim for a deduction

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from assessable income." Those words are, I think, the key to the whole of the question we have to determine. It is to be estimated—"but subject to the provisions hereinafter contained." Sub-s. 2 I will come back to presently, because that does not concern the main point with which I am at present dealing.

The next material section is s. 27, which prescribes the return which has to be made. Again I am reading it as amended: "Any person who claims an allowance or deduction under the preceding provisions of this part of this Act, shall, within the time limited by this Act for the delivery of lists, declarations, and statements, or within such further time as the general commissioners for the division may for any special reason allow, deliver to the assessor of the parish in which he resides, a notice of his claim, together with a declaration and statement in the prescribed form, signed by him, setting forth—(*a*) all the particular sources from which his income arises, and the particular amount arising from each source" . . . The form is prescribed by the Fifth Schedule; it is No. XVII.: "Lists, declarations, and statements to be delivered in order to obtain any exemption, abatement, or relief"—that must now be read: "any allowances or deductions"—"dependent upon the total income from all sources of the claimant. First, Declaration of the amount of value of property or profits or gains returned, or for which the claimant has been, or is liable to be, assessed." That is to say, the return which he has to make is the income for which he is liable to be assessed, that is the assessable income; and if it had not been for s. 15, sub-s. 4, of the Act of 1920, I think the super tax payer in respect of his earned income would have been entitled, in making his return, to have deducted the ten per cent. allowance or the maximum 200*l.*, as the case may be, in respect of his earned income, because the return which he has to make is that of his assessable income.

I think I have now referred to all the material sections of the two Acts. These provisions, when carefully considered, I think show that for the purpose of ascertaining the income in respect of which the taxpayer is to be charged with super

tax, it is the assessable income and not the taxable income which is that in respect of which he is to be taxed. If that view is correct, then inasmuch as what is called the personal allowance is a deduction not for the purpose of ascertaining the assessable income but is a deduction made for the purpose of ascertaining the taxable income, it cannot be allowed to the taxpayer when making his return for the purpose of super tax. He is not entitled to be allowed that, because it is not an allowance made for the purpose of ascertaining the assessable income, but only the taxable income. What I have said so far, I think, certainly deals with the second point made by the appellant in the present case. That point is that in returning his total income he is entitled to deduct the income tax. In my judgment that is quite incapable of being supported. The deduction of income tax would reduce the amount on which he is to be charged with super tax not only below the amount of the assessable income, but below the amount of the taxable income; and therefore it seems to me that it is quite impossible, on the provisions of the Acts as they are now, to allow him to deduct income tax for the purpose of arriving at the amount on which he is to be charged super tax. The second of the two subsidiary points, the one relating to pension, depends upon a special provision in the Rules applicable to Sch. E. It has been said that the taxpayer is entitled to deduct the amount of duties or other sums payable or chargeable upon his pension by virtue of any Act of Parliament, and that income tax is one of those sums. But it seems to me to be perfectly absurd to say that for the purpose of ascertaining the amount on which he shall be charged income tax you shall first deduct income tax; and of course "the amount of duties or other sums payable or chargeable upon the same by virtue of any Act of Parliament" refers not to the income tax but to a number of other charges which it is admitted have been made by various Acts of Parliament on pensions, salaries and so forth. For example many salaries paid to public servants are liable to a compulsory deduction for the purpose of providing a pension fund.

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Two points made by the appellant remain to be dealt with. It was said first that inasmuch as the earned income allowance is specially mentioned in the provision as to super tax and it is specially provided that that shall not be deducted for the purpose of ascertaining the income in respect of which the taxpayer is to be charged to super tax, therefore it must be inferred that the other allowances are to remain for the benefit of the payers of super tax as much as for the benefit of the payers of income tax. I do not see why that should be so, but I think it will not bear examination; because there is, in my opinion, a very good reason for inserting that provision as to the earned income allowance entirely consistent with the reason that I have already given for not allowing to the super tax payer the deduction in respect of the personal allowance. That reason is this. As I have already pointed out, the allowance in respect of earned income is a deduction from assessable income. It is taken away from the earned income before the amount of the assessable income is ascertained, and if it had not been for the express provision in sub-s. 4 of s. 15 of the Act of 1920, there would have been a very forcible argument, I think, on behalf of the taxpayer that as regards that allowance, at all events, he was entitled to it, because until that allowance had been made his assessable income could not be ascertained. Therefore, to avoid dispute on any such question, the Legislature thought fit to make an express provision that the super tax payer should not be entitled to that allowance. But I think the argument founded on that is a double-edged weapon, and one which tends to injure the person who uses it as much as the Crown against whom it is used. That is in this way: that it at all events shows that the Legislature did not intend the super tax payer to have that advantage which was given to the income tax payer.

The second of the two special arguments is that founded on sub-s. 2 of s. 5 of the Act of 1918. Sub-s. 2 appeared for the first time in the Finance Act, 1915, s. 18. The reason for its insertion was the then recent decision in *Inland Revenue Commissioners* v. *Brooks* (1), to the effect that for the

(1) [1915] A. C. 478.

purposes of super tax the assessment under income tax was not conclusive and the super tax payer was entitled to have it made again. This section was inserted to remedy that state of things, and to provide that an assessment to income tax, when final and conclusive, should be final and conclusive in estimating the super tax; and then it added the provision on which reliance was placed: "No allowance or adjustment of liability on the ground of diminution of income or loss shall be taken into account in estimating the total income from all sources, unless that allowance or adjustment has been previously made in respect of income tax on an application under the special provisions of this Act relating thereto." What was said was that the personal allowance was one of those referred to in that provision and that if the assessment to income tax was conclusive for one purpose, it was to be conclusive for all, and accordingly if that personal allowance had been made in assessing to income tax, it must also be made in assessing to super tax. I think the short answer to that is, that s. 5, sub-s. 2, of the Act of 1918 has nothing to do with these special allowances at all. What that sub-section deals with, I think, are the allowances and adjustments on the ground of diminution of income or loss. That is the matter with which the section is concerned, all of which may be taken into account for the purpose of obtaining a revision of the assessment for the purposes of income tax, if necessary, or may be taken into account in arriving at the original assessment. That is what is referred to and not the special deductions which were afterwards established by the Act of 1920. I think therefore that reliance cannot be placed upon s. 5, sub-s. 2, for the purpose for which the appellant seeks to rely upon it.

The result is that in my opinion the judgment of Sankey J. was quite correct and the appeal must be dismissed.

YOUNGER L.J. As at length I see this case, the main issue raised by the appeal depends in its last analysis upon the answer to a very simple question—namely, whether the appellant's income, described in the Finance Act, 1920, as

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his "assessable income," is arrived at before or after there has been made therefrom any deduction in respect of the personal allowance of 225*l.* referred to in para. 2 of the case.

Putting the matter very shortly the appellant was, in my judgment, assessable to super tax in respect of this so-called assessable income of his for the previous year. What that assessable income in all its items represented may or may not, in view of s. 27 of the Act of 1918, have been easy to determine. With that however we are not on this appeal concerned. What we are concerned with is to ascertain whether it did or did not include as one of its items this personal allowance in respect of which the appellant claims to be free of all liability for super tax. If the allowance would be properly deducted in the computation of his assessable income then in my judgment the appellant would be entitled to succeed on this issue; if it was properly included then, as I think, he must fail.

In my view any real difficulty there is in the case is occasioned by the presence, in the Act of 1920, of s. 15, sub-s. 4. That sub-section until I could justify and explain its presence in a manner satisfactory to myself appeared to me to constitute a formidable difficulty in the way of the Crown. But its presence can, I think, be explained in a way which has removed, at least from my mind, all difficulty. This explanation will however more clearly appear from a closer consideration of the subject.

The incidence of super tax before the Income Tax Act of 1918 is very compendiously stated by Lord Sumner in his speech in *Inland Revenue Commissioners* v. *Brooks* (1) in the following words: "My Lords, super tax is 'an additional duty of income tax' payable 'in respect of the income of any individual the total of which from all sources exceeds' the prescribed sum, and 'for the purposes of the super tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of

(1) [1915] A. C. 478, 492.

exemptions or abatements under the Income Tax Acts.'" That statement is convenient because it shows that just as the income referred to in the section with which Lord Sumner was dealing—namely, s. 66, sub-s. 1, of the Finance (1909–1910) Act, 1910, on or in respect of which super tax was chargeable was the "total income" defined or described in sub-s. 2, so the income referred to in s. 4 of the Income Tax Act, 1918, is the total income defined, in terms identical, in s. 5, sub-s. 1, of the same statute. But s. 5, sub-s. 1, of the Act of 1918 is now by virtue of s. 32 of the Finance Act, 1920, amended so that it has, since that Act became law, to be read as follows: "For the purposes of super tax the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year estimated in the same manner as the total income from all sources is required to be estimated on a return made in connection with any claim for a deduction from assessable income."

The effect of the sub-section as it now stands must accordingly be first of all ascertained. Now its phraseology, I think, plainly imports that the assessable income so referred to is the total income of the individual from all sources for the previous year from which no claim for deduction can validly be made, and that that so-called assessable income is the income in respect of which super tax is charged. What then in relation to that assessable income is the appellant's personal allowance of 225*l.*? The allowance is referred to in s. 18 of the Act, and there, by reference to s. 17, it is described as a deduction from assessable income. In other words the allowance is not a deduction from the total income from all sources made to arrive at the assessable income; it is a deduction from the assessable income itself, and is not to be regarded in arriving at the amount of such assessable income. After that allowance and any of the other deductions referred to in ss. 18 to 22 of the statute appropriate to the individual case have been made an income referred to in the Act as the "taxable income" is reached. "Taxable income" so arrived at is the income upon which income tax is charged. But it is not the income upon which

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super tax is charged. That is an income from which neither the deduction of this personal allowance nor any of the other deductions referred to in ss. 18 to 22 have been made. In other words, employing the terminology of the Act of 1920, the income in respect of which super tax is charged is the assessable and not the taxable income, and it is only the taxable income which is reached by making the deductions of which this personal allowance is one.

While, however, the above statements are true of all the deductions referred to in ss. 18 to 22 of the statute, the statement is not applicable to the deduction in respect of "earned income" referred to in s. 16. The assessable income is under that section only arrived at after the allowance in respect of earned income has been made. The allowance is not taken from assessable income, in order, as in the other cases, to reach taxable income. It has to be made before that which in the statute is referred to as assessable income is ascertained at all.

It is not to me quite clear why this distinction should have been made between the allowance in respect of earned income referred to in s. 16 and the deductions enumerated in ss. 18 to 22. It is not quite obvious why allowances like these deductions should not have been treated as a deduction from assessable income. We have however to take the statute as we find it, although the method adopted has created at least for me the difficulty of this appeal. While the Legislature has directed that the assessable income mentioned in s. 16 should be arrived at after the allowance in respect of earned income has been deducted, it was nevertheless minded to enact that the assessable income in respect of which super tax was to be charged should include all earned income without deduction. If therefore s. 16 was to retain its present form but was not to have the effect of exempting some earned income from super tax it was essentially necessary that that should be specially prevented, and it is by sub-s. 4 of s. 15 that it is so prevented. Had that sub-section or its equivalent not been inserted then with s. 16 in its present form it seems to me certain that as super tax is by the Act chargeable upon the assessable income it would then have been charged upon

a sum of income arrived at after and not before the earned income allowance conceded by s. 16 had been deducted. No such exception is however required in the cases of the other deductions; for in each of them the assessable income is arrived at not after but before they have been made.

Here then we have the explanation of sub-s. 4 of s. 15. Here too we have the reason why, although super tax, as I think, for the reason I have given, is intended to be charged on income arrived at without regard to the deductions in ss. 18 to 22, as much as without regard to any allowance in respect of earned income, it was not necessary in order to attain that end that any similar express reservations with reference to the deductions in these sections should be made. I am free to confess, however, that until I fully appreciated in relation to this question of assessable income the essential difference between s. 16 and ss. 18 to 22, I could myself see no sufficient answer to the suggestion that the express inclusion for the purposes of super tax of all earned income but with no such inclusion of the deductions enumerated in ss. 18 to 22 in pari materia did indicate that these latter deductions were intended to apply as much to super tax as to income tax. But so soon as the essential difference between s. 16 and ss. 18 to 22 in relation to assessable income is made apparent the difficulty in my judgment disappears.

For similar reasons I am of opinion that the appellant gains no assistance from s. 5, sub-s. 2, of the Act of 1918. That section, the history of which I need not recapitulate, has I think only reference to allowances or adjustments which are applicable both to income tax and to super tax. It does not operate so as to introduce for the purposes of super tax allowances or deductions which are otherwise shown not to be authorized, or to obliterate the distinction drawn for this purpose by the Act of 1920 between assessable income and taxable income.

Sir J. Simon insisted, and with reason, upon the fact that the new deductions and allowances under the Act of 1920 were, unlike the exemptions and abatements which they superseded, granted irrespective of the means or want of

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means of the taxpayer, being conceded in consideration of his presumed meritorious position in other respects, and counsel contended that there was no longer any reason in principle why these deductions and allowances should not inure for the benefit of the super tax payer as much as for the benefit of the income tax payer. The argument is very attractive; it might well have commended itself to the Legislature, which by treating the super tax as an additional income tax has gleaned sundry incidental advantages and might well have submitted to bear also the burden of the conception carried to its logical conclusion. Further, the deductions and allowances are granted to income tax payers however wealthy and they might presumably have been extended at least to the smaller of the super tax payers. But the Legislature has not thought fit to make any such wide reaching exemptions, and so far as the concession to the income tax payer in respect of earned income is concerned it has expressly excluded the super tax payer from any relief in respect of such income.

For myself I can understand that the Legislature might well have extended all the allowances or deductions in the Act of 1920 to the super tax payers; I can also understand that it might consistently have denied to the super tax payer the benefit of any of them. But I have some difficulty in discovering any intelligible reason for expressly depriving them, as it has done, of any deduction in respect of earned income, while extending to them, as it is suggested it has done, the benefit of all the other five deductions. Prima facie I should have supposed that either all of the deductions would have been granted or that none of them would be conceded. All this however is by the way. My judgment, apart from any such consideration, is that on the construction of the statute none of the allowances or deductions here in question are enjoyed by the super tax payer.

Upon the other questions raised by this appeal I have nothing to add.

Appeal dismissed.

Solicitors for the appellant: *Godden Holme & Ward.*

Solicitor for the respondents: *Solicitor of Inland Revenue.*

G. A. S.

[IN THE COURT OF APPEAL.]

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THE KING *v.* SPECIAL COMMISSIONERS OF INCOME TAX.

Ex parte SHAFTESBURY HOMES AND ARETHUSA TRAINING SHIP.

Revenue—Income Tax—Exemption—Charity—"Yearly interest or other annual payment"—Receipt by Charity of Balance of yearly Income and Profits of Business—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 105—*Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37, *sub-s.* 1 (*b*); *s.* 40.

A testator bequeathed to his trustees the goodwill of and the property in certain proprietary medicines "upon trust out of the annual income and profits thereof" to pay certain annuities, and, subject thereto, "upon trust to pay the balance of the annual income and profits thereof" to certain persons (since deceased) and after their deaths "to pay such yearly balance" to a charitable society. The "yearly profits" and the "annual income and profits" arising from certain other proprietary medicines were to be paid, after the deaths of certain persons, to the same society. After the testator's death his business in these properties was carried on by his trustees who paid the balance of the income and profits (after satisfying the various annuities) to the charitable society in accordance with the directions of the will. The charity claimed (1.) exemption from income tax under s. 37 of the Income Tax Act, 1918, in respect of the sums so received from the testator's trustees, and (2.) repayment under s. 40 of the Act of the tax which had been deducted and paid by the trustees before paying the yearly sums to the charity:—

Held, by the Court of Appeal, affirming the decision of a Divisional Court [1922] 2 K. B. 729, that the money received by the charity from the testator's trustees was an "annual payment" within s. 37 (*b*) of the Income Tax Act, 1918, which grants exemption from income tax under Sch. D "in respect of any yearly interest or other annual payment forming part of the income" of a charity, and, therefore, that the charity was entitled to the exemption and repayment claimed.

Held, further, that although the amount of the tax paid by the trustees on the profits of the business had been computed and paid in the usual way upon a three years' average, nevertheless the charity had shown that the duty in respect of each yearly payment had been paid by deduction or otherwise, within s. 105 of the Act of 1842.

Semble, the question of repayment cannot arise under the Act of 1918, because s. 40, sub-s. 3, of that Act provides, "where the special commissioners allow a claim they shall issue an order for repayment."

Dictum of Charles J. in *Trustees of Psalms and Hymns* v. *Whitwell* (1890) 3 Tax Cas. 7, 11, that the words "or other annual payment" are to be construed ejusdem generis with the words "yearly interest," disapproved.

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APPEAL from the decision of a Divisional Court (Lord Hewart C.J. and Lush and Bailhache JJ.)(1) upon the hearing of a rule nisi for a mandamus to the Special Commissioners of Income Tax requiring them to allow, under s. 37 of the Income Tax Act, 1918, the claim of the Shaftesbury Homes and Arethusa Training Ship (a charitable society, hereinafter called the "applicant society") for exemption from income tax in respect of the income derived by them under the trusts of the will of Alfred Fennings, and to issue their order, under s. 40 of the Income Tax Act, 1918, for repayment of 21,369*l.* 13*s.* 2*d.*, being the tax paid in respect of the income during the three years ending January 7, 1920.

By his will dated July 3, 1890, Alfred Fennings, after appointing executors and trustees, and making divers bequests, gave and bequeathed to his trustees (1.) the goodwill of and property in certain proprietary medicines "upon trust out of the annual income and profits thereof" to pay certain annuities (some of which were still subsisting) and, subject thereto, "upon trust to pay the balance of the annual income and profits thereof" to certain persons therein mentioned (all of whom had since died) for their respective lives, and, after their deaths, "to pay such yearly balance in perpetuity" to the treasurer of the applicant society on certain conditions; (2.) the goodwill of and property in certain other proprietary medicines "upon trust to pay the yearly profits arising therefrom" to G. A. Beavan (who had since died) during his life, and, after his death, "upon trust to pay the yearly profits arising therefrom in perpetuity" to the treasurer of the applicant society; and (3.) the goodwill of and property in a certain other proprietary medicine "upon trust to pay the annual income and profits thereof" to the several persons therein mentioned (some of whom were still alive) during their respective lives and the life of the survivor, and after the death of the survivor "upon trust to pay in perpetuity the annual income and profits thereof" to the applicant society.

The testator died on January 7, 1900. In that year an action was commenced in the Chancery Division for the

(1) [1922] 2 K. B. 729.

administration of his estate, and, pursuant to orders made therein, the trustees of the will from time to time paid to the applicant society the yearly balance of the income and profits of the business (which had been carried on by the trustees of the will under agreements with certain firms), the applicant society applying the money so received in the manner prescribed by the testator. The trustees of the will, before paying the moneys to the applicant society, deducted and paid income tax thereon, the amount of tax so paid under Sch. D from January 7, 1917, to January 7, 1920, being 21,369*l.* 13*s.* 2*d.*

The Special Commissioners, having refused to allow the applicant society's claim for exemption from income tax under s. 37 of the Income Tax Act, 1918, in respect of the income received by it, or to order repayment of the said sum of 21,369*l.* 13*s.* 2*d.*, the above rule was obtained.

The Divisional Court made the rule absolute (1), and the Commissioners appealed.

Douglas Hogg A.-G., *Sheldon* and *R. P. Hills* for the appellants, repeated the arguments used in the Court below, and in addition contended that, inasmuch as the trustees had paid the income tax in respect, not of each year's annual profits, but in respect of an average of three years, it had not been proved that the duties had been paid in respect of the yearly payments to the applicant society "by deduction or otherwise," as required by s. 105 of the Income Tax Act, 1842, in order to entitle the applicant society to repayment.

Maugham K.C. and *Gavin T. Simonds* for the respondents were not called upon to argue.

LORD STERNDALE M.R. This is an appeal from a Divisional Court of the King's Bench Division, consisting of the Lord Chief Justice, and Lush and Bailhache JJ., arising on a rule nisi for a mandamus to the Commissioners of Income Tax to make an allowance in accordance with the provisions of s. 105 of the Income Tax Act of 1842 or the corresponding

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s. 37 of the Act of 1918, to a certain society known as the "Shaftesbury Homes and the Arethusa Training Ship." [The Master of the Rolls stated the facts and continued:]

The first question that arises is whether those payments made by the trustees are included in the words "any yearly interest or other annual payment" within s. 37 (*b*) of the Income Tax Act, 1918. They are not yearly interest; that is obvious; and the question is whether they are an annual payment. A good deal of discussion has taken place here and in the Court below as to the application of the doctrine of ejusdem generis to those words, but I cannot see how that question arises at all. Eventually I think the learned counsel for the Crown came to this decision upon it, that the two things "yearly interest" and "or other annual payment" themselves constitute a genus. If that is so there is no room for the application of ejusdem generis because they are within the genus; they are part of it. What the genus is that is composed of "yearly interest or other annual payment" I do not quite know, but if those two are not put into a genus and you want to apply the doctrine of ejusdem generis to "other annual payment" then it seems to me it will have to be ejusdem generis with "yearly interest," and that seems clearly not the meaning of the words. I do not think there is any room in this section for the application of the doctrine; I do not think it arises at all, and in that I agree with the Lord Chief Justice. Therefore, the only question we have to consider is, is this an "annual payment" to the charity? That seems to me to depend almost entirely upon this further question: were the charity (which means, I suppose, the committee of the charity) carrying on this business? If they were then they were not getting an annual payment; they were merely getting the profits of the business that they were carrying on, and they would come within the four corners of the decision, which seems to me to be quite right, in the *Trustees of Psalms and Hymns* v. *Whitwell.* (1) Many cases have been cited which I am bound to say have very slight relevance, if any, to the point we are

(1) 3 Tax Cas. 7.

considering; others have been cited which no doubt are relevant as to the relation of trustee and cestui que trust in regard to income tax, chiefly *Williams* v. *Singer.* (1) The principle of that case and the principle of the other cases as to trustee and cestui que trust is said to establish that these trustees who are carrying on the business were carrying it on for the committee of the charity, and that therefore the committee of the charity were carrying it on themselves. I can only say that those cases do not seem to me to establish anything of the kind. In my opinion the committee of the charity are not carrying on this business themselves. That, I think, lies at the root of the whole matter. If they are not carrying on the business themselves then they are not receiving the profits of the business carried on by them, and if they are not doing that, then they are receiving an annual sum that is paid to them by somebody else. In those circumstances it does not seem to me to matter whether the amount which they are receiving is fixed at so much per year or whether it is fixed by reference to the profits of the business which the trustees are carrying on. It does not become a receipt by them of the profits of a business if it is not their own business, and if it be a payment, then it does not matter in the least that that payment arises out of the profits of a business that is carried on by somebody else.

In that I agree with the Divisional Court. But the Attorney-General at the last moment took a point which learned counsel for the respondents tells us was not taken below, and that point did trouble me at first. The Attorney-General argued that not only must the respondents show that they are entitled to exemption but they also must show that duties have been paid by them in respect of the yearly payment either by deduction from the same or otherwise, and that they do not do that for this reason, that the amount of the tax—that is to say, 5*s.* in the £—is not deducted from that sum at all as it is in the case of annuities, but what happens is simply that the amount that is left of the profits is diminished by the

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payment that has been made by the trustees who carry on the business in respect of income tax on the profits of the business. It is argued that the tax in that case is not deducted from or charged upon this sum, but is charged upon something perfectly different—namely, an average of the three years' profits of the business. Therefore, it is argued, although the respondents may satisfy the first part of the exempting section they do not satisfy the second part, because they have not shown that the amount of the duty has been paid in respect of such interest or yearly payment. It is a case which I do not suppose the framers of the section quite contemplated, and therefore the words are perhaps not quite clear at first sight; but I think, although I confess I was considerably taken with the point at first, that there is really nothing in it, for this reason. The taxation which is imposed on the profits of a business is the taxation for the year, but by reason of the difficulty, and sometimes the unfairness, of taking one year, a conventional method of computation of the income for the purpose of taxation has been provided by the Act. It has been provided that the profit for the year shall be arrived at by a computation of the average of the three preceding years, but when it has been arrived at on that computation, then that is the taxation which is to be applied to the taxable year. What has happened here is, that the amount which has to be handed over has been decreased by the amount of duty chargeable in respect of that taxable year, having been deducted from the balance before it was handed over, and therefore, as was said by Bailhache J., the payment that was made was a payment which would have been automatically increased but for the deduction of the tax from the sum paid at its source.

I think, therefore, that the benefit that the charity gets under this will is an annual payment which is exempt, and I think also the respondents satisfy the second part of the section and have shown that the duties in respect of such yearly payment have been paid either by deduction or otherwise. The appeal fails and must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. Under the will of the testator, Alfred Fennings, and an order made by Cozens-Hardy J., on July 3, 1901, the treasurer of the charity in question is and has for many years been in receipt of the annual profits of two businesses formerly belonging to the testator. In the case of one of the businesses they do not receive the whole because the testator directed certain annuities to be paid thereout, but they receive what is left after those annuities have been paid; in the case of the other they receive the whole of the profits. Those businesses are, under the trusts of the will and the orders of the Court, being carried on by the trustees of the testator's will and not by the charity itself. The profits in the one case and the balance of the profits in the other are paid by the trustees to the treasurer of the charity. The question is, first, whether the charity itself is entitled to an exemption from income tax in respect of the payments so made to it, and secondly, whether under the circumstances of the case it is entitled to be repaid the tax which the trustees of the testator's will have paid to the Crown in respect of these profits. The three years as to which the question arises are the years ending April 5, 1918, 1919, and 1920, and therefore they are governed, certainly as to the first two, by the Income Tax Act of 1842, and I think as to the last year by the Income Tax Act of 1918; but I do not think it much matters; the case has been argued as if they were all governed by the Act of 1842. I will deal with it on that footing for the moment, though I shall have a remark to make about the Act of 1918. The section on which the question turns is s. 105 of the Act of 1842, corresponding with s. 37, sub-s. 1 (*b*), of the Act of 1918. On that the question is: is the amount of the profits which are paid to the treasurer of this charity an annual payment? In my opinion it is. It is a payment by the trustees to the treasurer of the charity. It is annual because it is paid in respect of the profits each year. It is, therefore, one would have thought, quite plainly an annual payment made by one person to another. The Act provides that the charity "shall be entitled to the same exemption in respect of any

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yearly interest or other annual payment chargeable under Schedule (D) of this Act, in so far as the same shall be applied to charitable purposes only, as is hereinbefore granted to such (charity) in respect of any stock or dividends chargeable under Schedule (C)." Here it is, as I have said, an annual payment; it is an annual payment chargeable under Sch. D. It seems to me, therefore, that so far as the exemption is concerned the charity has brought itself exactly within the terms of the section, and the only difficulty with reference to those expressions in that part of the section is founded upon what is called the principle of ejusdem generis, though with all respect to the argument which has been addressed to us with reference to that, and with all respect also to the judgment of Charles J. in the case which has been cited, I cannot see how the principle of ejusdem generis has anything to do with it. Beyond the fact that it is a payment and that it is annual there is nothing in common between "yearly interest" and "any other annual payment." It is not a case of an enumeration of certain particulars followed by general words which, according to the doctrine I am referring to are held only to include other particulars which may be said to fall within the same genus as those which are indicated; it is simply two things specified, "yearly interest" and "other annual payment." There is nothing there to limit the kind of annual payment which you are to deal with. It seems to me, therefore, without saying more about it, that the charity have made out their right to the exemption. But it is said that they have not made out their right to have repaid to them the amount of the duties that has been paid. Sect. 105 of the Act of 1842 goes on, after creating the exemption, to provide that "such exemption shall be allowed by the Commissioners for special purposes, on due proof before them, and the amount of the duties which shall have been paid by such corporation," and so forth—the charity—"in respect of such interest or yearly payment, either by deduction from the same or otherwise, shall be repaid under the order of the said Commissioners." What is suggested is, that there has been no duty

paid by deduction or otherwise. All that has happened is, that the trustees have paid the income tax in respect, not of each year's annual profits, but in respect of the average of three years according to the plan fixed by the Income Tax Act in the case of the profits of a business. With all respect I do not think that is so. I think they have deducted, by paying to the Government, the income tax in respect of the profits for each year. Sch. D of the Act of 1842, which imposes the tax, imposes it in these terms: it is a tax upon "the annual profits or gains arising or accruing"—leaving out immaterial words—"from any trade." Then by the rule for ascertaining those duties in the particular cases mentioned it is provided that "the duty to be charged shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure or concern upon a full and just average of three years." It seems to me it is the duty upon the annual profits and gains, but it is computed in a special way owing to the fact that those profits and gains vary from year to year. It is none the less the duty in respect of that annual payment that has to be reckoned in the way laid down by the Act. It seems to me, therefore, that the judgments of the Divisional Court were correct, and the appeal must be dismissed.

With regard to the last point, I should just like to point out that so far as I can make out from a somewhat cursory examination of the Act of 1918 no question can ever arise upon that in the future. The provisions of the Act of 1918 are different to those of the Act of 1842. Sect. 37 provides that exemption shall be granted from, amongst other things, "tax under Schedule (C) in respect of any . . . . yearly interest or other annual payment forming part of the income" of the charity. I need not read the rest of it. Then provisions are made in s. 40 as to claiming repayments, and all that s. 40 lays down is, the Commissioners before whom the claim is to be made and the mode in which it shall be made; and sub-s. 3 is: "Where the Special Commissioners allow a claim they shall issue an Order for repayment." Nothing is said in the section at all

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about the foundation of the claim; that it to say, there is no reference to payment by deduction or otherwise; it simply assumes that there being an exemption there may be a claim either to exemption from the tax or to repayment of the tax actually paid, and it provides simply in general terms, that where that claim is made out, then the Commissioners, when they allow a claim, shall issue an order for repayment. It seems to me, therefore, that this second question cannot arise in respect of any years to which the Act of 1842 does not apply. On the whole I think the judgment of the Court below was correct and this appeal must be dismissed.

YOUNGER L.J. I am of the same opinion. It was not, as I understood him, contested by counsel for the appellants that you can have annual payments to a charity out of the yearly profits of a business exempted from tax under s. 105 of the Act of 1842. If that be agreed, then it can in my judgment make no difference whether such payments represent the whole or the residue of such yearly profits, provided only that the business itself is not being carried on by the charity. And the charity is not carrying on the business here in question or any of the businesses here in question. Nor again can it in my judgment be said that the duties, in respect of the annual payments which have been made in this case to the charity, have not been paid by a deduction from those payments or otherwise within the meaning of these words in s. 105 of the Act. Accordingly, in my judgment the decision of the Court below was right, and this appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellants: *Solicitor of Inland Revenue.*
Solicitors for the respondents: *Hawes, Wood & Ware.*

G. A. S.

[IN THE COURT OF CRIMINAL APPEAL.]

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THE KING *v.* BENTLEY.

Criminal Law—Inciting Another to procure Acts of gross Indecency with Appellant by unknown Males—Criminal Law Amendment Act, 1885 (48 *&* 49 *Vict. c.* 69), *s.* 11.

The appellant telephoned to W. asking if he could have two boys for immoral purposes. No particular boys were named or indicated. The appellant was charged with inciting W. "to procure the commission by certain male unknown persons of acts of gross indecency with him," the appellant:—

Held, that as the appellant was inciting W. to commit what, if he had done the acts, would have been a criminal offence, it was immaterial that the male persons he was to procure were not at the time ascertained or that the appellant was inciting W. to incite another to commit an offence, and that the appellant was rightly convicted.

APPEAL against conviction.

The appellant, John Alfred Bentley, was convicted at the Cheshire Assizes on a count in an indictment which charged that he "on the 12th day of November, 1921 . . . . unlawfully incited Thomas Albert Williams to procure the commission by certain male unknown persons of acts of gross indecency with him, the said John Alfred Bentley." The charge was therefore of inciting W. to commit the offence contained in s. 11 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69).

The appellant telephoned to Williams to ask if he (the appellant) could have two boys at 10*s.* each that evening for the above purpose. No boys were mentioned by name or otherwise indicated. Williams did not act on the suggestion. The appellant was convicted and sentenced to twelve months' imprisonment.

The appellant appealed.

Goodman Roberts for the appellant. Before the appellant can be convicted it must be shown that some definite person was in the contemplation of either the appellant or Williams: *Horton* v. *Mead.* (1) Phillimore J. said in that case (2):

(1) [1913] 1 K. B. 154. (2) Ibid. 158.

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"Supposing that he [the person soliciting] smiled in the face of a blind man . . . . it might perhaps then be, though there was the intention to solicit, that he could not be convicted of solicitation." A fortiori there can be no solicitation of a person not present and not ascertained.

The offence of gross indecency requires two consenting parties. That involves the necessity of inciting one of the parties. Therefore the appellant is charged with inciting Williams to incite a third person. If that charge could be maintained there would be no limit to it, and A might be charged with inciting B to incite C to incite D, and so ad infinitum. In *Reg.* v. *Ransford* (1), the authority relied on by the Crown, the prisoner incited a boy to commit an offence with him, not, as in the present case, to incite another to commit the offence. In *Reg.* v. *Eagleton* (2) Parke B. said: "Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are."

[*Rex* v. *Robinson* (3) and *Rex* v. *Cope* (4) were also referred to.]

H. M. Paul (*Ralph Sutton* with him) was not called upon to argue.

The judgment of the Court (Lord Hewart C.J., Darling and Salter JJ.) was delivered by

LORD HEWART C.J. The appellant was convicted on the seventh count of an indictment which charged that he "on the 12th day of November, 1921, ... unlawfully incited Thomas Albert Williams to procure the commission by certain male unknown persons of acts of gross indecency with him, the said A. J. Bentley." The charge was the inciting to commit the offence described in the Criminal Law Amendment Act, 1885, s. 11. Upon that count the appellant was convicted and sentenced to twelve months' imprisonment. Against that conviction he now appeals. Two points were taken on his behalf. First it was said that

(1) (1874) 13 Cox, C. C. 9.
(2) (1855) Dears. 515, 538.
(3) [1915] 2 K. B. 342.
(4) (1921) 38 Times L. R. 243.

the words "certain male unknown persons" were not precise enough, and that the male persons should be identifiable. For that proposition a passage from the judgment of Phillimore J. in *Horton* v. *Mead* (1) was cited. In that case the charge was one under s. 1, sub-s. 1, of the Vagrancy Act, 1898, which made it an offence persistently to solicit, and it was contended that it was not necessary that the solicitation should reach the ears of the person solicited, and it was so held. In the present case the appellant is charged with inciting a definite person, Williams, to commit the definite offence stated, and it is immaterial that the persons to be procured are not identified.

The second point taken is that the charge involves the incitement of one person to incite somebody else. The whole force of that argument is based on the assumption that the word "procure" can be paraphrased by "incite to." Whether such a paraphrase is correct or not may be a question, but even if it were correct it is difficult to see where the repugnancy arises. Sect. 11 of the Criminal Law Amendment Act, 1885, says that: "Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour." Here the appellant offered money to Williams to procure boys to commit acts of gross indecency with him. That is to say, if the jury accepted that evidence he incited Williams to procure boys for that purpose. It cannot be denied that if Williams had acted on that incitement and had procured boys he would have been guilty of the offence of procuring. The mere fact that in carrying out that procuring he must himself have incited some boy seems to the Court quite immaterial. The charge was one of inciting Williams to procure the commission of these acts. The learned judge at the trial said that the legal question had been fully argued before him and he had no doubt that the appellant could be convicted if the jury thought fit to convict. In

(1) [1913] 1 K. B. 154, 158.

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our opinion he was right, and there was ample evidence upon which the jury could come to the conclusion to which in fact they came.

Appeal dismissed.

Solicitors for appellant: *Ranger, Burton & Frost, for G. F. Lees & Son, Birkenhead.*

Solicitor for Crown: *Director of Public Prosecutions.*

W. L. L. B.

1922
Nov. 29.

MANTON *v.* BROCKLEBANK.

Negligence—Trespass—Horses in Field—One injured by the Other—Liability of Owner.

The defendant put a mare into a field in which there was a horse belonging to the plaintiff without notifying the plaintiff. The mare kicked the horse, which had to be destroyed. No scienter was proved in the defendant, but it was found that the propensity of horses running loose to injure one another in sport or quarrel was common knowledge:—

Held, per Darling J., that having this knowledge the defendant was negligent in not notifying the plaintiff and was liable; per Salter J. that the mare must, in such circumstances as the present, be classed among animals feræ naturæ, and that as the defendant had knowledge of the mare's characteristics as being matter of common knowledge he was liable in trespass.

APPEAL from the County Court at Kingston-upon-Hull.

The plaintiff, Mrs. Sarah Manton, had been accustomed to put her horse "Prince" to agistment in a field belonging to a Mr. Shillito, and it was there on October 9 and 10, 1921. On October 8 the defendant's son, Arthur Brocklebank, on behalf of the defendant, George Brocklebank, obtained Mr. Shillito's consent to put a mare into the same field for agistment. The defendant had on October 6 agreed to purchase the mare, which was fourteen years old, from a Mr. Buffey on a warranty that she was quiet, but had her on approval for three weeks. On October 9 the mare was placed in the field without any notification to the plaintiff, although in the circumstances there would have been no difficulty in seeing him, and on October 10 "Prince"

was found with a broken off foreleg, which the deputy county court judge found had been caused by a kick from the mare, and it had to be destroyed. Neither the horse nor the mare had had its shoes removed, both being in daily work. There was evidence that at the time the injury was discovered the mare was running about the field with her ears back, switching her tail and showing the whites of her eyes. There was also evidence that on two previous occasions when fresh horses were put into this field the plaintiff had been notified, and had watched them for a short time to see how they behaved.

The deputy county court judge found as facts that he was not satisfied that there was a custom before turning a horse out to grass, either to take off its shoes or give notice to the owners of other horses already in the field, though he thought it might be prudent to do so. He also held that there was no scienter as to the mare's character in the defendant. He held as a matter of law that when a horse is turned out to grass loose and uncontrolled among other strange horses, and injures one of them, it is not necessary for the owner of the injured animal to prove scienter, it being natural to all horses in such circumstances to kick and bite each other in play as well as in quarrel, and he referred to *Lee* v. *Riley*. (1) He also found that if the mere omission to give notice was negligence, the defendant had been guilty of negligence.

Judgment was given for the plaintiff for 49*l*.

The defendant appealed.

Pritt for the appellant. The county court judge was wrong. An examination of the case of *Lee* v. *Riley* (1) shows where he was mistaken. In that case there was a cause of action preceding the injury to the plaintiff's horse—namely, a trespass by the defendant's horse—and the only question was whether the damage, which happened to take the form of injury to the plaintiff's horse, was too remote. That case was followed in *Ellis* v. *Loftus Iron Co.* (2) In the present

(1) (1865) 18 C. B. (N. S.) 722. (2) (1874) L. R. 10 C. P. 10.

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case there is no such cause of action, both horses being lawfully in the field. Horses are within the class of animals mansuetæ naturæ and are not within the doctrine of *Rylands* v. *Fletcher* (1), although it is true that they sometimes do injure each other either in sport or quarrel.

[DARLING J. referred to *Lowery* v. *Walker*. (2)]

In that case it was found that the defendant knew that the horse was savage. There is no evidence of scienter in the present case. The case nearest to the present one is *Gaunt* v. *Smith* (3), but that was an action against the agister himself.

[DARLING J. referred to the judgment of Lord Raymond in *Rex* v. *Huggins*. (4)]

The knowledge of the propensities of horses would be shared with the defendant by the plaintiff who, knowing that other horses might be agisted in the field, took the risk.

[*Mason* v. *Keeling* (5) and Bullen and Leake's Pleadings, 3rd ed., 416, were also referred to.]

van den Berg for the respondent. The case can be put in this way. It is the natural and probable consequence of putting two horses together in a field that they will injure one another in sport or in quarrel, and this is common knowledge. When, therefore, the defendant put his mare in the field he should have contemplated the result; he put it there at his peril. The action is really founded in negligence.

[DARLING J. referred to *Cox* v. *Burbidge*. (6)]

That case was decided on the ground that it is not the ordinary nature of a horse to attack a child on the highway, and if it was the decision would have been different. If the defendant had notified the plaintiff that he was putting his mare in the field, the horses could then have been watched for a time, when the vicious propensities of the defendant's mare would have been noticed. It was negligent not to so notify.

(1) (1868) L. R. 3 H. L. 330.
(2) [1911] A. C. 10.
(3) (1856) Unreported. Cited in Oliphant's Law of Horses, 6th ed., p. 244.
(4) (1730) 2 Ld. Raym. 1574, 1583.
(5) (1700) 1 Ld. Raym. 606.
(6) (1863) 13 C. B. (N. S.) 430, 437.

[The judgment of Lush J. in *Turner* v. *Coates* (1) and Halsbury's Laws of England, vol. xiii., para. 684, p. 494, were also referred to.]

Pritt in reply.

[SALTER J. On principle must not the defendant's horse be classed among animals feræ naturæ qua other horses in these circumstances ?]

No. An owner becomes liable for the acts of his animal, (1.) where it trespasses, (2.) where he has been negligent, and (3.) in anomalous cases like *Rylands* v. *Fletcher*. (2) There is here no question of trespass; there is no evidence of negligence; and *Rylands* v. *Fletcher* (2) does not apply where the plaintiff took the same risk as the defendant.

[Bullen and Leake's Pleadings, 3rd ed., p. 366, was also referred to.]

DARLING J. The facts in this case are peculiar in this, that what took place between these two horses must have happened over and over again, and yet no reported case has been brought to our attention in which a claim has been put in the same way. The case has been very well argued, and it is a difficult one. I have come to the conclusion that the learned deputy county court judge was right. The facts were as follows. A Mr. Shillito used to take horses into his field for agistment, and in the field there was a horse belonging to the plaintiff. The defendant had bought a mare on approval with a warranty that she was quiet, and he wished to see whether she would suit him, and arranged with Mr. Shillito to turn it into the field where the plaintiff's horse was. The horse was kicked by the mare and had to be destroyed. Judgment was given for the plaintiff for damages. The deputy judge stated his grounds as follows: "I hold as a matter of law that when a horse is turned out to grass loose and uncontrolled amongst other strange horses and does injury to one of them, it is not necessary for the owner of the injured animal, in order to recover damages, to prove scienter, it being natural to all horses in such

(1) [1917] 1 K. B. 670, 674. (2) L. R. 3 H. L. 330.

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Darling J.

circumstances to kick and bite each other in play as well as in quarrel, and therefore the plaintiff is entitled to recover against the owner of the animal doing the damage." He made that statement as to scienter for the reason that it is well established that there is a difference as to responsibility for animals feræ naturæ and those mansuetæ naturæ. The matter is very plainly put by Lord Raymond in the case of *Rex* v. *Huggins*. (1) He said: "There is a difference between beasts that are feræ natura, as lions and tygers, which a man must always keep up at his peril; and beasts that are mansuetæ natura, and break through the tameness of their nature, such as oxen and horses. In the latter case an action lies, if the owner has had notice of the quality of the beast; in the former case an action lies without such notice." The animal in the present case was a mare, and therefore in the class of animals of a tame nature, and when such an animal does damage it is not to be presumed that its owner keeps it at his peril, but it must be shown that he knew its nature to be different from that of animals of a tame nature. Such is the case of a dog. But this particular case does not fall within the analogy of such a case as that. Although the mare was within the class of these animals mansuetæ naturæ, she must be taken with all her qualities, and one must look not only at her vices but at her infirmities of nature. The deputy county court judge has found as a fact that it is natural to all horses in such circumstances as the present to kick each other either in play or in quarrel, and this is well known to everybody. A mare is likely to be skittish, and may do what the mare in this case in fact did. I do not think it is necessary for the plaintiff to prove more than that. It seems to me that this case is really covered by authority. In *Cox* v. *Burbidge* (2) a horse got upon the highway and injured a child, and it was held that the owner was not liable in damages. Erle C.J. said (3): "The owner of a horse must be taken to know that the animal will stray if not properly secured, and may find its way into his neighbour's

(1) 2 Ld. Raym. 1574, 1583. (2) 13 C. B. (N. S.) 430.
(3) Ibid. 437.

corn or pasture. For a trespass of that kind, the owner is of course responsible. But, if the horse does something which is quite contrary to his ordinary nature, something which his owner has no reason to expect he will do, he has the same sort of protection that the owner of a dog has: and everybody knows that it is not at all the ordinary habit of a horse to kick a child on a highway." It is obvious to me that if it had been shown that it was the ordinary habit of horses to do as that particular horse did the plaintiff would have had a good cause of action. That fact differentiates the case from the present one. The other judges used practically the same language. Williams J. said (1): "We must assume that the injury to the plaintiff was caused by the horse having viciously kicked him, as a horse of ordinary temper would not have done." And Willes J. said (2): "The important circumstance in this case is, that the act was not in accordance with the ordinary instinct of the animal, which was not shown to be of a mischievous disposition. Does, then, the fact of the horse being on the highway make any difference? No doubt, if the horse was trespassing there, the owner of the highway might have an action against the owner of the horse. So, possibly the owner of the horse might be liable to an indictment for obstructing the highway, or to a fine. But that was not the cause of the mischief here. It comes round, therefore, to the question, whether the owner is liable for an act of this sort done by an animal not of a naturally vicious character, and which is not found to have been accustomed to commit such mischief." So it would be necessary to show some such habit in the case of a horse attacking a child. I come to the conclusion that this mare only did what any one owning her ought to have known she very probably would do. Was it not his duty therefore to take care that she should not do it? I think it was. This is an action in tort, and I think it was really a negligent act for the defendant not to give notice to the plaintiff that he was going to put an animal into the field which was likely to injure the horse which was already there.

(1) 13 C. B. (N. S.) 439. (2) Ibid. 441.

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I wish particularly to guard myself from saying anything from which it may be inferred that I should give a similar judgment in a case where the space into which an animal was turned was a large space, such as a common. In such a place as the New Forest, for example, it would be impossible to warn every other owner entitled to forest rights that it was proposed to put another pony there. But this was not a large field, and it only had one horse in it.

Whether or not this can be called an action for negligence may be doubtful, but it is unnecessary to decide that. Yet I think the facts are so stated as to show a legal ground of action, and that this is a case which illustrates the maxim "Ubi jus ibi remedium," and one in which I may rely on what is said in the note to *Ashby* v. *White* (1) in Smith's Leading Cases, 12th ed., vol. i., p. 293, with regard to an action on the case. That action was devised, with the writ which commenced it, where there was no existing precedent to meet the mischief of the case. The note proceeds: "The statute of Westminster II. (13 Edw. 1, c. 24) . . . . was passed to quicken the diligence of the clerks in the chancery (2), who were too much attached to ancient precedents, [and] enacted that 'whensoever . . . . a writ shall be found in the chancery, and in a like case falling under the same right, and requiring like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one.' . . . . Accordingly the courts have always held that the novelty of the particular complaint alleged in an action on the case is no objection, provided an injury cognizable by law be shown to have been inflicted on the plaintiff. Thus, in *Chapman* v. *Pickersgill* (3), which was an action for falsely

(1) (1703) 2 Ld. Raym. 938; 1 Sm. L. C., 12th ed., 266.

(2) [This is an old but manifest historical error. The King's clerks had been more inventive, on the contrary, than the barons liked. In 1258 the Chancellor was bound by the Provisions of Oxford to swear that he would seal no writ "out of course" without the sanction of the King's Council: Stubbs, Sel. Ch., 9th ed., 380, 382. Thus the intention of the words "in consimili casu" was not to enable the clerks to form new writs, but to limit the power of forming them to "a like case," etc. Judicial construction, however, could not be restrained.—F. P.]

(3) (1762) 2 Wils. 145.

and maliciously suing out a commission of bankruptcy, Pratt C.J., in answer to the objection that the action was of a novel description, observed (1): 'So it was said in *Ashby* v. *White*. (2) I wish never to hear this objection again. This action is for a tort; torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief.'" And *Winsmore* v. *Greenbank* (3) was also referred to. In the present case the facts are new only in the sense that they are brought before a court for the first time. For these reasons I think that the action was rightly brought, and that the appeal must be dismissed.

SALTER J. I am of the same opinion. This appeal raises a question which is important, and, to my mind, not free from difficulty. If a person choose to possess an animal feræ naturæ, of a race or class accustomed to damage person or property, he is responsible in law, apart from any question of negligence, for any damage the animal may do acting in accordance with its nature, which the owner would be presumed to know. If the animal is not of that class but its individual character is that of the above genus, then it is classed with animals feræ naturæ, and the same liability attaches to its owner provided its character be known to him. I think that this is an action of trespass. The liability is one incident to the right of ownership, and is based on the principle "Sic utere tuo ut alienum non lædas." I believe it to be a rule of law that if an animal which is the subject of property, acting according to the nature of that animal as known to its owner, whether as a matter of common or particular knowledge, injures the person or property of another, its owner is responsible. Where the animal is one of the class of animals feræ naturæ its propensities are a matter of common knowledge, and the owner cannot be heard to say that he did not know them. Where the animal is not of that class, then particular knowledge or scienter must be shown. But it seems to me that animals cannot be

(1) (1762) 2 Wils. 146.
(2) (1703) 2 Ld. Raym. 938; 1 Sm. L. C., 12th ed., 266.
(3) (1745) Willes, 577.

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Salter J.

exclusively classed as either feræ naturæ or mansuetæ naturæ. An animal may be of a class which is not accustomed to attack mankind or injure property, but accustomed to damage particular property in a particular way. I decide this case upon the footing that it was proved as a fact, well known and recognized, that it is part of the nature of horses to injure each other either in sport or in quarrel when running loose together in a field. Therefore it was not necessary to prove that the owner of the mare had any particular knowledge of her individual propensities. That being so, the mare, acting in accordance with her nature and the nature of all horses, of which her owner must be taken to have knowledge, has injured the property of another. I think therefore that the owner is liable, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Smith & Hudson, for Payne & Payne, Hull.*

Solicitors for respondent: *Windybank, Samuell & Lawrence, for Laverack, Wray & Co., Hull.*

W. L. L. B.

THE KING *v.* ADAMS AND ANOTHER (JUSTICES).

1922
Dec. 12.

Ex parte POPE.

Highway—Licence to take Materials for Repair of Highways—Licence not specifying its Duration or for what Repairs granted—Validity—Highway Act, 1835 (5 *&* 6 *Will.* 4, *c.* 50), *ss.* 53, 54, *Schedule, Form* 10.

A licence granted by justices under the Highway Act, 1835, authorizing a highway authority to take from inclosed land materials for the repair of highways is not bad on its face because it does not specify the precise period during which it is to be operative or because it is granted in respect of unspecified repairs.

RULE NISI calling upon justices for the county of Devon to show cause why a writ of certiorari should not issue to remove into this Court an order dated June 7, 1922, whereby the justices granted to Crediton Rural District Council licence to dig, get, take and carry away certain materials, for repairing the highways in Sandford parish, from land known as Henstill Quarry of which the applicant for the rule, Alfred Pope, was the owner and occupier.

The licence granted by the justices recited that the district council were by statute authorized to get materials lying upon land within any parish within their district for the use of the highways, but not without the consent of the occupier or owner of such lands or a licence from justices, that it appeared to the justices that the council's surveyor had applied to Alfred Pope for his consent to get materials from his land for the purpose aforesaid and that these materials were necessary for the repairs of the highways and that Alfred Pope had refused to permit the same to be dug and carried away; it then continued: "and the said Alfred Pope having been duly summoned to appear before us to show cause why such permission should not be granted and having appeared before us accordingly we have heard what has been alleged and taken the said matter into consideration and are of opinion that the said materials are necessary and ought to be dug, got, taken, and carried away for the purpose aforesaid: Therefore we do hereby give our licence for the

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said district council to dig get take and carry away the same accordingly, the said council making satisfaction for the same and also for the damage done to such lands in the manner directed by the said Act."

The material grounds upon which the rule was obtained were: (1.) that the justices wrongly decided a question which was preliminary to the exercise of jurisdiction by them—namely, that the materials were required and were necessary and ought to be got and taken away at the time for the making or repairing of the highways; (2.) that the justices had no power in law to grant a licence for an indefinite period of time; and (3.) that the justices had no power in law to grant a licence in respect of unspecified repairs.

The justices who granted the licence filed an affidavit in which they stated that they were satisfied on the evidence before them that stone was, at the material time, required for the repair of a section of the roads in the parish of Sandford, and that it could best be obtained from Henstill Quarry.

Scholefield K.C. and *G. D. Roberts* for the Rural District Council showed cause. In view of the justices' affidavit that there was evidence before them that at the material time stone was required for the repair of the roads, the first ground on which the rule was obtained cannot be relied on by the applicant. The applicant's second point is that the licence is bad because it does not specify the time during which it is to be operative. No case has laid it down that a time must be specified in the licence, and indeed in form 10 in the Schedule to the Highway Act, 1835, which this licence substantially follows, no time is mentioned. In *Earl Manvers* v. *Bartholomew* (1) Cockburn C.J. said "that the authority which the justices may give to the surveyor is co-extensive with the existing necessity for materials, with reference to which the application for the licence is made," and Mellor J. said: "I do not say that the licence must necessarily be given year by year, or for any particular time,

(1) (1878) 4 Q. B. D. 5, 7, 8.

but I think it cannot be looked on as absolutely indefinite." That decision negatives the contention that a time must be specified. In *Rex* v. *Bradford* (1) a licence was held bad which authorized the surveyor to take materials for a period of five years without reference to the necessities existing at the date of its grant. With regard to the applicant's third point—namely, that the licence is bad because it is in respect of unspecified repairs, the answer is that form 10 in the Schedule to the Act does not provide for any specification of the repairs that are to be carried out.

A further answer to this rule is that by virtue of s. 107 of the Highway Act, 1835, no order made under the Act is to be removable by certiorari; the remedy of a person aggrieved is by appeal to quarter sessions: s. 105.

[They referred to *Reg.* v. *Badger* (2), and *Rex* v. *Nat Bell Liquors, Ld.* (3)]

Macmorran K.C. and *Croom-Johnson* in support of the rule. Although it is true that the applicant could have appealed to quarter sessions, that fact does not deprive him of the right to a writ of certiorari where the order complained of is bad on its face, as is the licence in this case, because it neither specifies the time during which it is to be operative nor the repairs for which the materials were to be taken. A licence under the Highway Act, 1835, must be "co-extensive with the existing necessity for materials, with reference to which the application for the licence is made"—per Cockburn C.J. in *Earl Manvers* v. *Bartholomew* (4); it must not be for a longer period: per Channell J. in *Rex* v. *Bradford* (5); hence the necessity for expressly limiting its duration, otherwise the highway authority might continue to take materials after the necessity for them had ceased. Further, the licence should specify the repairs to be executed.

LORD HEWART C.J. [after dealing with the applicant's contention that the justices acted in excess of their jurisdiction because they had no evidence before them from which

(1) [1908] 1 K. B. 365.
(2) (1856) 6 E. & B. 137.
(3) [1922] 2 A. C. 128.
(4) 4 Q. B. D. 5, 7.
(5) [1908] 1 K. B. 365, 372.

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Lord Hewart C.J.

they could draw the inference that the materials were required for the repair of the highways, and holding that there was evidence upon which they could find as they did, continued :] It is admitted that the licence granted in this case follows substantially the form of licence set out in the Schedule to the Highway Act, 1835—form No. 10, and it seems a strange proposition to say that an order which is substantially identical with that set out in the statute is nevertheless bad upon its face. This licence, however, is said to be bad on its face because it improperly omits to specify a limit of time during which it is to be operative and at the expiration of which it is to be spent ; and further, because it improperly omits to specify, or fails to specify with sufficient particularity, the repairs for the execution of which the materials were said to be required. Our attention has been directed to *Rex* v. *Bradford* (1) and *Earl Manvers* v. *Bartholomew* (2), and as I understand the judgments in those cases they decide that the form in the Schedule, when considered side by side with the provisions of the Act, means that the licence which is granted is limited by the necessities for repair existing at the time of the grant of the licence. If, for example, a licence is granted for a term certain, say for five years, it is bad, because non constat that the repairs required to be done at the time the licence is granted may not be completed long before the expiration of the five years, and if they were completed before that period had expired the licence would be given a currency extending beyond the period necessary for the repairs ; in other words, that would be a licence which the Act does not contemplate. Exactly the same kind of reasoning might be applied to a licence for any particular period. To specify a period of one year may appear at first sight attractive, but a period of one year may be just as excessive in particular circumstances as five years in other circumstances. This case forcibly illustrates the difficulties which may arise if justices go beyond the form provided by the Act and take it upon themselves to name a particular period during which the licence shall be operative.

(1) [1908] 1 K. B. 365. (2) 4 Q. B. D. 5.

The difficulty might perhaps be surmounted if the licence were expressed to be limited for such time as might be necessary for the carrying out of the repairs required to be executed at the time the licence is granted, or in any event not exceeding a certain time, naming the maximum period. But inasmuch as the object of the licence is to enable materials to be obtained for carrying out the repairs necessary at the time it is granted it seems useless to name any period. I do not read any of the judgments in the cases cited as laying down that the naming of a particular period is necessary, and, indeed, the judgment of Mellor J. in *Earl Manvers* v. *Bartholomew* (1) seems to express the view that no particular period need be named. It is said that if one looks at the form in the Schedule the words about the repairs are also vague. So they are. They are to be read in conjunction with the provisions of the statute. The terms of this licence, so far as the work to be done is concerned, follow almost exactly the language of the form in the Schedule. It might well be convenient and desirable that the justices should, with some particularity, specify the work that is to be done. But we cannot say that because the licence does not give further and better particulars it is bad upon its face. It is admitted that there is an appeal to quarter sessions from the grant of a licence, and therefore the present applicant is in a further difficulty when he asks that the justices' order should be quashed upon certiorari. Speaking for myself, I can see no reason why we should take the course he asks us to take.

DARLING J. I am of the same opinion. It appears to me that this power is capable of being easily abused, but this can be guarded against by an appeal to quarter sessions. Why that remedy was not taken in this case I cannot say. The justices have followed the form set out in the Schedule to the Highway Act, stating that the materials are necessary for the repair of the roads and they have given a licence to take the materials from the applicant's property. In making such an order I do not see why they should not limit

(1) 4 Q. B. D. 5.

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Darling J.

the highway authority's right by tonnage rather than by limiting their right to take materials during a certain time. A time limit is of no use. If the licence fixes a period of one year, a greater quantity of materials than necessary might be taken. If the justices know the state of the roads they can arrive at a decision as to the repairs that are necessary and say how many tons of materials will be required. In this case the licence limits no time because it is intended not for all time but pro hac vice. This is not a case for certiorari.

SALTER J. I agree.

Rule discharged.

Solicitors for applicant: *Taylor, Jelf & Co., for J. & S. P. Pope, Exeter.*

Solicitors for respondents: *Guscotte, Wadham, Tickell, Thurland, for Sparkes, Pope, Thomas & Mathew, Crediton.*

J. S. H.

C. A.

1922 *Nov.* 20, 22, 23; *Dec.* 15.

[IN THE COURT OF APPEAL.]

PATERSON ZOCHONIS AND COMPANY, LIMITED *v.* ELDER DEMPSTER AND COMPANY, LIMITED, AND OTHERS.

[1921. P. 2067.]

Shipping—Bill of Lading—Exemption Clauses—Implied Warranty of Seaworthiness—Unfitness for Carriage of Cargo—Bad Stowage—Liability of Shipowner.

Shipowners let the use of their steamer on a time charter to charterers who intended to use her as one of their line of steamers trading with West Africa in palm oil and other merchandise. Casks of palm oil may be safely stowed one upon another in three or four but not more than four tiers, and ships carrying this cargo are usually constructed with 'tween decks allowing a small space for other cargo in their holds between the topmost row of casks and the deck above. The ship had no permanent 'tween decks nor any appliances for laying a temporary 'tween deck. She had holds twenty-four feet deep. She shipped at West African ports under bills of lading issued by the direction of the charterers a number of casks of palm oil, which were stowed properly in tiers at the bottom of the holds. The whole space between the casks and the main deck

was filled with other cargo of a weight much greater than the casks could support, and the casks were crushed and a quantity of the oil was lost. In an action by the holders of the bills of lading against the charterers and owners of the ship:—

Held, by Bankes L.J. and Eve J. (Scrutton L.J. dissenting), that the ship was unseaworthy for the carriage of the plaintiffs' cargo.

The bills of lading contained clauses exempting the charterers from liability for (among other things) loss, injury, or damage arising from a leakage or breakage, or for damage arising from other goods by stowage, or for loss or damage arising from collision, stranding, straining, jettison, or any other peril of the sea "whether any perils, causes, or things in this clause mentioned are due to . . . . the wrongful act, omission, or error in judgment or negligence of the company's"—i.e., the charterers'—"pilot, master, officer . . . . crew, stevedore, or any person whomsoever in the service of the company, or not . . . . and whether due to or arising directly or indirectly from unseaworthiness of the ship . . . . provided in case of any loss, injury, or damage arising from or due to unseaworthiness of the ship at the beginning of the voyage all reasonable means shall have been taken to provide against such unseaworthiness. The company may entrust to experienced or qualified officers . . . . the duty of providing against unseaworthiness and shall then be deemed to have fulfilled its obligation hereunder. This clause shall be construed as in addition to and not in derogation of or in substitution for any statutory exemption or provision in favour of the company."

Held, by Bankes L.J. and Eve J., that this clause did not protect the charterers from liability for breach of their implied warranty that the ship was seaworthy; and that they and the owners of the ship were liable for the loss.

Bank of Australasia v. *Clan Line* [1916] 1 K. B. 39 followed.

Judgment of Rowlatt J. affirmed.

APPEAL from the judgment of Rowlatt J. in an action tried before the learned judge without a jury.

The plaintiffs were the owners of 297 casks of palm oil shipped at Sherbro in West Africa and 138 butts of palm oil shipped at Conakry in French Guinea on the steamship *Grelwen* for carriage to Hull as hereinafter mentioned.

The defendants Elder Dempster & Co. employed a number of ships in the West African trade, of which the export of palm oil in casks forms an important part. Casks or butts containing the oil may be stowed at the bottom of a hold, and three or at the most four tiers of casks may be laid one upon another. If more than four tiers are so laid the lower casks are likely to be crushed by the weight from above. Therefore ships regularly engaged in this trade are constructed with a 'tween deck below the main deck. Three or four tiers of casks

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may then be laid at the bottom of the lower hold and an equal number at the bottom of the 'tween deck hold, and the small space between the casks in the lower hold and the 'tween deck, or between those in the 'tween deck hold and the main deck, may be filled with other cargo.

The defendants Elder Dempster & Co. hired the use of the steamship *Grelwen* upon a time charter from her owners, intending to use her as one of their line of steamers engaged in this trade. She was classed 100 A1 at Lloyd's, but she had not theretofore been engaged in this trade, and her captain had never before had any experience of palm oil as cargo. She had holds twenty-four feet deep below the main deck and had no permanent 'tween deck nor any appliances for laying a temporary 'tween deck.

The *Grelwen* took on board the 297 casks of palm oil at Sherbro and 138 butts at Conakry, as mentioned above. The bills of lading were dated respectively November 22, 1919, at Sherbro and December 3, 1919, at Conakry. They were issued in the names of the "African Steamship Company and the British and African Steam Navigation Company. Managers, Elder Dempster & Company." These three companies and the Griffiths Lewis Steam Navigation Company, the owners of the *Grelwen*, were the defendants in the action.

The bills of lading contained the following clauses:—

"The shipowners (1) hereinafter called the company . . . .

"2. . . . . shall not be liable for any loss, injury or damage arising from:—the act of God, the King's enemies . . . . leakage, breakage, chafing . . . . insufficiency of wrappers and packages; or for any damage arising from other goods by stowage or contact with the goods shipped hereunder; or for any loss, injury or damage arising from sweating, leakage, smell or evaporation from such goods or any other goods. The company shall not be liable for risk of lighterage, craft, hulk, storage or transhipment, or for loss, injury or damage arising from or due to explosion, heat, fire at any time or place whatever, boilers, steam engines, or machinery,

(1) It was not disputed that this term included the defendants Elder Dempster & Co., the time charterers of the *Grelwen*.

or from any damage to or defect in hull, tackle, boilers, steam engines or other engines, oil or other fuel, or machinery, sheds, warehouses, carts or other vehicles, or their appurtenances. The company shall not be liable for or for any loss or damage arising from or due to collision, stranding, straining, jettison or any other peril of the sea, rivers, navigation, or land transit, of whatsoever nature or kind; whether any perils, causes or things, in this clause mentioned, are due to, or arise directly or indirectly from the wrongful act, omission or error in judgment or negligence of the company's pilot, master, officer, engineer, crew, stevedore, or any person whomsoever in the service of the company, or any person or persons or company for whose acts the company would otherwise be liable, or not, and whether on the ship carrying these goods or not; and whether due to or arising directly or indirectly from unseaworthiness of the ship, vessel, craft or lighter at the commencement of the carriage or during the carriage or any part thereof; provided in case of any loss, injury or damage arising from or due to unseaworthiness of the ship at the beginning of the voyage all reasonable means shall have been taken to provide against such unseaworthiness. The company may entrust to experienced or qualified officers, servants or agents the duty of providing against unseaworthiness, and shall then be deemed to have fulfilled its obligation hereunder. This clause shall be construed as in addition to and not in derogation of or in substitution for any statutory exemption or provision in favour of the company."

"4. The company shall not be liable in any event for loss of, or damage to, meat, butter, fruit $\frac{\text{and}}{\text{or}}$ other perishable goods, placed or carried in cool or refrigerated chambers in what manner soever such loss or damage may be caused. All such goods are carried on the express condition that the shipper and consignee waive any and every warranty of seaworthiness or fitness implied or otherwise . . . . the company undertaking only the appointment of experienced officers and engineers, the shippers being at liberty to inspect the refrigeration chambers before shipment

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of their goods. . . . . All the exceptions contained in clause 2 hereof when consistent with the terms of this clause shall apply to the shipment, carriage and delivery of the above mentioned and other perishable goods, but nothing contained in clause 2 hereof shall be deemed in any wise to lessen the force of any stipulation contained in this clause, and in particular the exception of unseaworthiness or unfitness under this clause shall be absolute and shall not be subject to the proviso contained in clause 2 hereof with reference to unseaworthiness or unfitness."

"10. No claim whatever for loss or damage to goods will be admitted unless it be made in writing with full particulars to the company or its agent within two days after the delivery of, or failure to deliver the goods. Any claim shall, if required by the company, be presented in Liverpool. . . . ."

"11. The company has the right to carry the goods below deck $\frac{\text{and}}{\text{or}}$ on deck in branch steamers $\frac{\text{and}}{\text{or}}$ lighters, river steamers, launches, boats or canoes, and to land and store goods for the purposes of transhipment, reshipment or further carriage, and shall have the right to sub-contract in respect of the carriage or any part thereof, and shall not be liable for any loss, damage or injury within the exceptions in this bill of lading mentioned, whether due to the negligence of its servants or not, but such exceptions shall apply to carriage by such sub-contractors as if such sub-contractors were specifically mentioned in the said exceptions. . . . ."

"In witness whereof the agent of the company hath signed . . . . bills of lading of this tenour and date. . . . ."

The casks and butts containing the plaintiffs' oil were stowed in holds numbered 2, 3, and 4 in two or three tiers. The whole space between the uppermost tier and the main deck was filled with bags of palm kernels to a weight much greater than that of an additional tier of casks. When the *Grelwen* arrived at Hull on December 21, 1919, it was found that many of the casks were crushed and that a large quantity of the oil had escaped.

The plaintiffs claimed 6901*l.* 13*s.* 11*d.* for non-delivery of 8 tons 3 cwt. 1 qr. 18 lbs. of the oil shipped at Sherbro

and 3 tons 19 cwt. 2 qrs. 17 lbs. of the oil shipped at Conakry and for damage done to the residue of the oil which was delivered. They alleged that the defendants were negligent in stowing the plaintiffs' oil and that the vessel was structurally unfit and not properly equipped for the carriage thereof, in that the holds were of unusual depth and that there was no platform or temporary deck erected or other sufficient means adopted for protecting the plaintiffs' oil from the weight and pressure of other goods stowed on top of it.

The learned judge found that the loss was due not to any inherent weakness of the casks, but to the fact that a greater weight was laid upon them than they could bear. He held that the *Grelwen* was unseaworthy for the carriage of this cargo, that the loss was not caused by mere bad stowage, and that there had been a breach of the implied warranty by the defendants that the vessel was seaworthy. He held further, following *Bank of Australasia* v. *Clan Line* (1), that the exceptions from liability in clause 2 of the bills of lading were only exceptions from liability for loss or damage arising from collision, stranding, straining, jettison, or other peril of the sea mentioned in the third sentence of clause 2, and not from liability under the implied warranty of seaworthiness; but in case he should be wrong on this point he went on to hold that there was no evidence that reasonable care had been taken to provide against unseaworthiness. He therefore gave judgment for the plaintiffs.

The defendants appealed.

Stuart Bevan K.C. and *Pritt* for the appellants other than the Griffiths Lewis Steam Navigation Company. The loss was due to bad stowage and not to any unseaworthiness of the *Grelwen*. The vessel was duly classed at Lloyd's. The learned judge has found as a fact that she was well appointed for the purpose of traversing the sea, and that the casks succumbed to a weight which they could not bear; that is to say the cargo was badly stowed on a seaworthy ship. The case falls within the principle of *Bond* v. *Federal Steam*

(1) [1916] 1 K. B. 39.

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Co. (1); *S.S. Calcutta Co.* v. *Weir & Co.* (2); *The Thorsa.* (3) The bad stowage endangered the goods directly, not mediately through endangering the ship, as in *Kopitoff* v. *Wilson* (4); *Ingram* v. *Services Maritimes du Tréport.* (5)

[SCRUTTON L.J. referred to *Wade* v. *Cockerline* (6); *Wiener* v. *Wilson's Line.* (7)]

For loss owing to bad stowage the appellants are protected by the first sentence in clause 2 of the bills of lading.

Secondly, assuming the vessel was unseaworthy the appellants are protected by the words in the third sentence of clause 2. The learned judge has read the words "in this clause mentioned" as meaning "in this sentence mentioned," and consequently he has held that the only events in which notwithstanding unseaworthiness the appellants are protected from liability are when the loss arises from collision, stranding, straining, or other perils of the sea. This is to place an undue restriction on the meaning of the words "in this clause mentioned." "This clause" means the whole of clause 2, as is clearly shown by the words of clause 4.

Neilson K.C. and *Clement Davies* for Griffiths Lewis Steam Navigation Company. These appellants adopt the above argument. In addition they submit that, even if the vessel was unseaworthy and if clause 2 of the bill of lading affords no protection, they, the owners of the *Grelwen*, are not liable. They have never had possession of the goods and are no parties to the contract contained in the bill of lading.

Jowitt K.C. and *Le Quesne* for the respondents. This vessel was unseaworthy, not in the sense that she was unable to ride the seas in safety, but in the sense that she was structurally unfit to carry this cargo and had no available means for adapting her for that service. If a ship is in this condition she is unseaworthy and her owner has failed to perform his warranty that she is seaworthy: *Stanton* v. *Richardson* (8); *Queensland National Bank* v. *P. & O. Steam*

(1) (1905) 21 Times L. R. 438; (1906) 22 Times L. R. 685.
(2) (1910) 15 Com. Cas. 172, 191.
(3) [1916] P. 257.
(4) (1876) 1 Q. B. D. 377.
(5) [1913] 1 K. B. 538.
(6) (1904) 10 Com. Cas. 47, 115.
(7) (1910) 15 Com. Cas. 294.
(8) (1874) L. R. 9 C. P. 390.

Co. (1); *Hogarth* v. *Walker* (2); *Upperton* v. *Union Castle Line* (3); *Ciampa* v. *British India Steam Co.* (4) No doubt the cargo was damaged because a weight greater than it could bear was placed upon it. That may in a sense be bad stowage; but if the holds of the ship are so constructed that this is the only practicable method of stowage, the ship is unseaworthy.

The respondents are not protected by clause 2 of the bill of lading. That clause contains no express warranty of seaworthiness, and the exceptions from liability, such as they are, are not to be read as exceptions from liability on the implied warranty: *Tattersall* v. *National Steamship Co.* (5); *Morris* v. *Oceanic Steam Co.* (6); *Bank of Australasia* v. *Clan Line.* (7) Furthermore, the exception from liability for "loss, injury, or damage arising from or due to unseaworthiness of the ship" is conditional upon "all reasonable means" having been taken "to provide against such unseaworthiness," and there is no evidence that any such means were taken.

The Griffiths Lewis Steam Navigation Company, the owners of the *Grelwen*, are liable in tort, first, as bailees of the goods, without any conditions relieving them from liability; and secondly for inviting the respondents to commit their goods to an unseaworthy ship: *The Termagant.* (8)

[BANKES L.J. referred to *Hayn* v. *Culliford* (9) and *Foulkes* v. *Metropolitan District Ry. Co.* (10)]

Stuart Bevan K.C. in reply. Clause 2 of the bills of lading really contains an express contract to provide a seaworthy ship. It provides that the appellants shall not be liable for loss arising from unseaworthiness provided that reasonable means have been taken to provide against unseaworthiness; which is the same as saying that if those means are not taken the appellants shall be liable for loss arising from unseaworthiness. Thus the implied warranty is ousted by the

(1) [1898] 1 Q. B. 567.
(2) [1900] 2 Q. B. 283.
(3) (1903) 9 Com. Cas. 50.
(4) [1915] 2 K. B. 774.
(5) (1884) 12 Q. B. D. 297.
(6) (1900) 16 Times L. R. 533.
(7) [1916] 1 K. B. 39.
(8) (1914) 19 Com. Cas. 239.
(9) (1879) 4 C. P. D. 182.
(10) (1880) 5 C. P. D. 157.

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express warranty: *Atlantic Shipping Co.* v. *Dreyfus & Co.* (1); and the conditions limiting the appellants' liability apply.

The Griffiths Lewis Steam Navigation Company were not bailees of the respondents' cargo. The captain in taking the cargo on board was acting as the servant of the charterers and not of the owner.

[SCRUTTON L.J. referred to *Omoa Coal Co.* v. *Huntley.* (2)]

The cargo was taken on board only on the terms of the bills of lading. The respondents cannot, having entered into one contract for the ship's services, claim performance of another.

Cur. adv. vult.

Dec. 15. The following written judgments were delivered:—

BANKES L.J. The plaintiffs' claim in this action is for damage to a quantity of palm oil in casks and butts whilst being conveyed in the steamship *Grelwen* from ports in West Africa to Hull. The total number of casks and butts shipped was 437, of which 297 casks were shipped at Sherbro under a bill of lading dated November 22, 1919, and 138 butts at Conakry under a bill of lading dated December 3, 1919. Both butts and casks were the kind of cargo which must necessarily be stowed at the bottom of a hold. The stowage plan of the vessel was put in evidence at the trial, from which it appeared that the *Grelwen* on this voyage carried butts and casks of palm oil in holds 2, 3 and 4—namely, in hold No. 2, 523 butts and 57 casks, in hold No. 3, 316 butts and 13 casks, in hold No. 4, 232 butts and 82 casks, all shipped at Sherbro, and 147 butts in No. 3 hold shipped at Conakry. There must be some confusion in the figures on the stowage plan between butts and casks, as according to the plan only 149 casks in all were stowed. It is not possible therefore to trace the plaintiffs' oil as shipped at Sherbro into any particular hold. The butts shipped at Conakry were stowed in No. 3 hold. On arrival at Hull the butts and casks and their contents were found to be in what some of the witnesses described as a shocking condition. The butts and casks had in many

(1) [1922] 2 A. C. 250, 261. (2) (1877) 2 C. P. D. 464.

instances been crushed or flattened by the weight which had been placed upon them, and a large quantity of oil had escaped into the holds and bilges of the vessel. The plaintiffs claimed damages from the Griffiths Lewis Steam Navigation Company as owners of the vessel, and from the other defendants as the persons liable upon the bills of lading. There can be no doubt as to what caused the damage complained of. It was undoubtedly the great weight of cargo which was stowed directly upon the butts and casks. In each case this cargo consisted of bags of kernels of a total weight in No. 2 hold of 781 tons, in No. 3 of 660 tons, and in No. 4 of 709 tons.

At the trial in the Court below the main question, so far as the evidence was concerned, was whether the responsibility for the damage rested upon the plaintiffs on the ground that the butts and casks were not reasonably fit for the purpose for which they were used, or whether it rested upon the defendants upon the ground that the vessel was unseaworthy, in the sense that she was not properly or sufficiently equipped to carry this particular cargo. On the question of the condition of the casks the learned judge found in the plaintiffs' favour and no question arises on that point now. The argument in this Court on this part of the case has been confined to the question whether upon the plaintiffs' evidence the judge's finding that the vessel was unseaworthy was justified.

Before dealing with the evidence it is necessary to define precisely what the obligation upon the defendants is and to consider some of the authorities to which attention has been called. I select a passage from Lord Blackburn's speech in *Steel* v. *State Line Steamship Co.* (1) as exactly expressing what the extent of the obligation is: "I take it, my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something

(1) (1877) 3 App. Cas. 72, 86.

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be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit." The question in every case must be whether the vessel is, or is not, fit for the purpose of carrying the particular cargo in respect of which the complaint of unseaworthiness is made. It is not necessary that the complaint should have reference to the whole of the vessel. It is quite sufficient if it is established as to a particular part of the vessel in which the cargo, about which the complaint is made, is carried. The complaint must have reference to the state or condition of the vessel, and very often it has reference to the want of some necessary equipment. I propose to refer to a few only of the authorities in support of these propositions. In *Tattersall* v. *National Steamship Co.* (1) the complaint was infection of the vessel by foot and mouth disease rendering her unfit to carry cattle. In *Stanton* v. *Richardson* (2) the complaint was that the vessel's pumps were unfit to enable her to carry a cargo of wet sugar. In *Ciampa* v. *British India Steam Navigation Co.* (3) the complaint was of the after effects of the fumigation of a vessel upon a parcel of lemons. In *Queensland National Bank* v. *P. & O. Steam Co.* (4) the complaint was of the construction of the bullion room. In *Upperton* v. *Union Castle Line* (5) the complaint was as to the construction of a lavatory which was used as a luggage room. In all the above cases the complaint was held upon the evidence to be justified, and the finding was that the ship was unseaworthy. In *The Maori King* (6), where the question turned upon a breakdown of refrigerating machinery during the voyage, A. L. Smith L.J. formulated the point for decision in these words: "Whether the plaintiffs are right in saying that there is an implied warranty that that part of the ship

(1) 12 Q. B. D. 297.
(2) L. R. 9 C. P. 390.
(3) [1915] 2 K. B. 774.
(4) [1898] 1 Q. B. 567.
(5) 9 Com. Cas. 50.
(6) [1895] 2 Q. B. 550, 561.

in which the meat is taken shall be 'seaworthy' when the voyage begins."

The question for decision in the present case depends upon what is the true inference to be drawn from the facts. Before dealing with the evidence I must call attention to the course the action took in the Court below. The plaintiffs' case was that the vessel was unseaworthy for one or both of two reasons: (1.) that the proper steps had not been taken to equip the vessel so as to enable a temporary deck or platform to be laid to keep any excessive weight off the tiers of casks; (2.) that the escaped oil had clogged the pipes leading to the pumps. The learned judge decided against the plaintiffs' second contention, and I did not understand that any objection to this finding was pressed in this Court. The defendants' case on the other hand, so far as the evidence was concerned, was confined to an attempt to prove that the fault lay entirely with the condition of the butts and casks, and that no complaint could be made of the stowage. Having failed in this contention the appellants are driven to contend as their only point in this Court that the damage was caused by bad stowage, and that the vessel was not unseaworthy. The question for decision consequently is: Whether the facts as proved constitute a case of damage as the result of bad stowage, or damage as a result of unseaworthiness, in the sense in which that word is used in this connection. I here wish to point out that mere proof of the fact that the loss complained of may have resulted from bad stowage does not exclude all possibility of establishing a case of unseaworthiness. Scrutton J. calls attention to this point in *Ingram & Royle* v. *Services Maritimes Du Tréport* (1) and cites authority in support of the proposition.

I pass now to consider the material facts, upon which there is little if any dispute. Palm oil in butts or casks is what Mr. Minto, the marine superintendent of Messrs. Elder Dempster, describes as a prominent feature of West African cargoes. Messrs. Elder Dempster employ a number of vessels in the West African trade. All the vessels regularly engaged

(1) [1913] 1 K. B. 538, 543.

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in the trade have 'tween decks. Palm oil in casks or butts is always loaded at the bottom of a hold, and the butts or casks are piled on each other in tiers. There is a difference of opinion as to whether the butts or casks will bear the weight of more than three tiers. Some witnesses speak to four. No one suggests more than four. In 'tween deck ships four tiers or three tiers with a small quantity of kernels in bags will fill the hold—and consequently in 'tween deck ships there is no possibility of subjecting the butts or casks to the pressure to which they were subjected in the present case. The *Grelwen* is not regularly engaged in this trade. She was chartered in May, 1919, on a time charter for twelve months. Her captain had never before this voyage had any experience of palm oil as cargo. The vessel has no 'tween decks. She is what is known as a single deck ship and her holds are some twenty-four feet deep from the main deck to the tank top. The whole or practically the whole of these spaces above the three or four tiers of butts and casks were on the voyage in question filled with bags of kernels, which were laid without any effective protection upon the butts or casks. There was no satisfactory evidence of palm oil in casks ever having been safely carried in a single deck ship before. One witness spoke to two occasions, but he could give no names, and no investigation was made into the question how the cargo was stowed or protected. But in one of the two instances it was proved that the casks were badly damaged. The complaint of the plaintiffs is that the vessel was not properly equipped, in that there was no proper receptacle (to use the language of Collins M.R. in *Upperton* v. *Union Castle Line* (1)) in which the palm oil could be carried. They contend that the erection of a platform or temporary deck on which the weight of the bags of kernels could be carried was essential in order to render the vessel seaworthy to carry their particular cargo. Temporary 'tween deck platforms are, according to the plaintiffs' evidence, quite well recognized as part of a vessel's equipment in cases where the nature of the cargo requires them. One witness

(1) 9 Com. Cas. 50.

speaks of their use in connection with the carriage of onions, and another in connection with the carriage of candied peel. The *Grelwen* was so constructed that she would have required some special fittings to carry the beams on which the platform would be laid; and it might, and probably would, have been necessary for her to take the beams out with her to the West African Coast. On this point the evidence of Captain Coysh, a marine surveyor called for the defendants, is important. In answer to Mr. Jowitt he said that it would have been quite possible to rig up a temporary deck, and that it is simple enough for a vessel to take out to West Africa the necessary beams for a platform if it is known that she is going to carry oil in casks. As to the necessity and reasonableness of this particular form of equipment, and as to its absence constituting unseaworthiness, the evidence is all one way. The nature of the damage sufficiently indicates the necessity. The witnesses who were called for the plaintiffs deposed to the other points, and no one was called to contradict them. The answer attempted is that the casks, if proper casks, would have carried the weight placed upon them. The judge has negatived this contention and no one is now questioning that part of his decision. He has accepted the evidence of the plaintiffs' witnesses. Is there any authority which indicates that he was not entitled to accept it? I think not. On the contrary I think that the language used in some of the cases tends in favour of the view taken by the learned judge. I will deal with some of these cases before dealing with those in which the decision has been in favour of bad stowage as against unseaworthiness. *Hogarth* v. *Walker* (1) was a case tried before Bigham J. in which the question was whether under a policy of insurance covering ship's "furniture," dunnage mats and separation cloths were included in that expression. The learned judge treated both as necessary for the carriage of the cargo, and says that if the ship went to sea without them she would be unseaworthy. He says that he sees no distinction between them and movable bulkheads. In the

(1) [1899] 2 Q. B. 401.

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Court of Appeal A. L. Smith L.J. says (1) with regard to the dunnage mats: "If they are, as was stated, laid on the floor of the ship to prevent the grain from being damaged by wet from the floor, I should think that the vessel would not be seaworthy for the carriage of grain in bulk unless she had such mats." There does not appear to me to be any difference in principle between the temporary platform contended for in the present case and Bigham J.'s temporary bulkhead, or A. L. Smith L.J.'s equipment for protection of the cargo from damage from below. I refer also to the judgment of Collins M.R. to which I have already alluded in *Upperton* v. *Union Castle Co.* (2) where he says: "Now the ship in order to be seaworthy for the business of carrying passengers and luggage must be fitted and equipped with proper receptacles for the luggage. It is admitted that at the time of starting from Las Palmas this lavatory was the only available place for the respondents' luggage; prima facie therefore the ship was not at that time properly equipped. It was contended, however, that the damage was really due to negligent stowage or to a negligent act on the part of one of the crew. It seems to me that this was a question of fact and that there was plenty of evidence to justify the learned judge in finding that the ship was not seaworthy."

I pass now to consider a few of the cases in which the decision has been against unseaworthiness, and in favour of bad stowage. *The Thorsa* (3) is one of the more recent. In that case the trial judge held upon the evidence that the damage was due to bad stowage and that the ship was not unseaworthy. On appeal the decision was affirmed. Swinfen Eady L.J. in his judgment (4) expressly points out that in that case it had not been contended that the ship was in any way defective in design or structure or in condition or equipment at the time she sailed. The *S.S. Calcutta Co.* v. *Weir & Co.* (5) was a case in which a number of points were

(1) [1900] 2 Q. B. 283, 285.
(2) 9 Com. Cas. 50, 52.
(3) [1916] P. 257.
(4) [1916] P. 261.
(5) 15 Com. Cas. 172.

raised and among them the question of unseaworthiness of the vessel by reason of some dates which were damaged being placed in a particular position in one part of a hold. A passage in the judgment of Hamilton J. (1) (as he then was) is, I think, instructive, as he makes it clear that he comes to this decision upon the evidence laid before him. *Bond* v. *Federal Steam Navigation Co.* (2) is another case to which reference may be made. In that case Channell J. held upon the evidence that the equipment of the ship so far as the refrigerating machinery was concerned was ample, but that it had been rendered insufficient by reason of bad stowing. He refused to find that the ship was unseaworthy. I have referred to these authorities as samples only of their class. They do I think sufficiently indicate the lines upon which the decisions have proceeded when dealing with questions of unseaworthiness and of bad stowage as opposed to unseaworthiness. In my opinion Rowlatt J. was justified upon the evidence before him in arriving at the conclusion at which he did arrive on this part of the case. I agree with him in thinking that the vessel was wanting in the necessary equipment to render her seaworthy to carry the plaintiffs' oil.

Every case must depend upon its own particular circumstances. The present case seems to me a very special one in which the evidence takes it altogether out of the region of bad stowage and into the region of unfitness of the vessel to carry the particular cargo. Captain Minto, the appellants' principal witness, seems to share this view, as on p. 19 of the note of his evidence he treats the piling of oil casks eight tiers high as not being a question of stowage at all. In dealing with this case I do not think that the Court is at liberty to take the stowage plan and endeavour to restow the cargo, so that damage could have been avoided. No one has suggested that it would have been possible, and the Court has no evidence on which to act. I also think that it is no answer to the complaint that the holds of this vessel were unfit to carry palm oil, and in that sense unseaworthy, to say that if no other cargo but the palm oil had been placed in them

(1) 15 Com. Cas. 191. (2) 21 Times L. R. 438; 22 Times L. R. 685.

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no damage would have been done, and that the case is therefore one of bad stowage.

Having arrived at the conclusion that the vessel was unseaworthy it is necessary to deal with the contention that the appellants are protected by the conditions in the bills of lading. The bills of lading do not contain any express warranty of seaworthiness. Under these circumstances it is I think established that though exceptions may be introduced in a bill of lading to an express warranty of seaworthiness, where there is no express warranty exceptions will be read as not applicable to the implied warranty. I endeavoured to give an explanation of this rule in *Bank of Australasia* v. *Clan Line* (1), but I am not sure that it is not wiser to accept the fact than to attempt to give an explanation of it. Be that as it may, if the rule is applied in this case the result is that none of the exceptions touch the plaintiffs' complaint of the breach of the implied warranty that the vessel was seaworthy when she started on her voyage. Apart from this consideration I think that the appellants must fail upon this part of the case upon one or both of two grounds: (A) That the language of the exception clause, No. 2, is so ambiguous that it affords no protection: see *Nelson Line* v. *James Nelson & Sons* (2); (B) that no case with regard to the officers being experienced or qualified was made in the Court below, and that even if it had been made there was no evidence that all reasonable means had been taken by the employment of officers, servants, agents, or otherwise to provide against unseaworthiness. For these reasons I consider that the appeal by the defendants other than the owners fails. With regard to the owners I cannot see how they can be in a better position than the charterers and grantors of the bills of lading. Under these circumstances the appeal of both sets of appellants fails and must be dismissed with costs.

SCRUTTON L.J. This is an appeal from a judgment of Rowlatt J. finding the owners and charterers of a steamer

(1) [1916] 1 K. B. 39, 55. (2) [1908] A. C. 16.

called the *Grelwen* liable for damage to a shipment of palm oil in casks. The damage complained of is that the casks were crushed by excessive weight loaded above them without sufficient means being provided to keep the weight off the casks. The judge has found that the ship was unseaworthy, in the sense of being unfit for the carriage of this cargo, and I gather that the exact unseaworthiness he finds is that the ship had not on board iron or wooden beams fifty feet long to go athwart the holds and support a platform which would keep the superior weight off the casks below.

The *Grelwen* is classed 100 A1 at Lloyd's and is a ship of what is known as the Isherwood construction, a type analogous to a standard ship, having amongst others this feature, that in the hold under the main deck she has not, as many ships have, either a permanently laid 'tween deck, or permanent thwartship beams on which a temporary 'tween deck could be laid. She has a single hold some twenty-four feet deep. It would be absurd to suggest that merely on that account she is unseaworthy. Lloyd's class her with that feature of construction, which has many advantages for stowage.

Most of the ships running in the Elder Dempster Line from and to West Africa have a laid 'tween deck under the main deck. Between the 'tween deck and the floor of the hold there is room for four tiers of palm oil casks, or three tiers and some bags. This is normal stowage and the weight is not enough to damage the bottom tier. But in a deep hold like the *Grelwen's* when three tiers of palm oil casks have been stowed there are still some fifteen feet of space which if filled with bags of palm kernels would have four times as much weight as a fourth tier of casks. There was on the ship some light cargo, 201 bales of wool, and 11,500 bundles of piassava, described in the evidence as light straw-like fibre. Instead of utilizing this light cargo in holds 2, 3 and 4, or leaving, as a ship often has to do, an empty space at the top of the hold, a platform was laid of shifting boards on the top of the casks and on this the hold was filled with bags of palm-nut kernels. An attempt was made to prove that the casks were defective. The learned judge negatived

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this and I see no reason to interfere with his finding. I treat the case on the assumption that excessive weight stowed above the casks damaged them, and that this was bad stowage. Was it within the authorities unseaworthiness ?

It has been established by authorities binding on this Court that the fact that a ship seaworthy in other respects sails on her voyage with a hold so stowed that one parcel of cargo must damage another is not unseaworthiness of the ship, but bad stowage by the ship's servants. Swinfen Eady L.J. expresses this in *The Thorsa* (1) by saying : " The contention put forward really amounts to this, that if two parcels of cargo are so stowed that one can injure the other during the course of the voyage, the ship is unseaworthy. I am not prepared to accept that. It would be an extension of the meaning of 'unseaworthiness' going far beyond any reported case." Similar passages are to be found in the judgments of *Bond* v. *Federal Steam Navigation Co.* (2); *S.S. Calcutta Co.* v. *Weir & Co.* (3); *Wade* v. *Cockerline* (4); and *Ingram & Royle* v. *Services Maritimes Du Tréport.* (5) These cases, and particularly the decision of this Court in *The Thorsa* (6), in my opinion prevent us from saying that a ship which starts with her cargo so stowed that damage must ensue on the voyage is therefore unseaworthy. The ship must be fit at loading to carry the cargo the subject of the particular contract. If she is so fit, and the cargo when loaded does not make her unseaworthy, as in the case of the iron plates which might go through the ship's side, the fact that other cargo is so stowed as to endanger the contract cargo, is bad stowage on a seaworthy ship, not stowage of the contract cargo on an unseaworthy ship. The *Thorsa* when loaded was so stowed that the cheese would damage the chocolate, but this Court did not hold her unfit to carry the chocolate. She could have carried it safely if properly stowed. Where weighty cargo is stowed on the top of perishable cargo, the ship, if stable, is not unseaworthy,

(1) [1916] P. 257, 262.
(2) 22 Times L. R. 685.
(3) 15 Com. Cas. 172.
(4) 10 Com. Cas. 47, 115.
(5) [1913] 1 K. B. 538.
(6) [1916] P. 257.

but is badly stowed. The nautical witnesses who said this ship was unseaworthy would also have said the *Thorsa* was unseaworthy, for they did not know the law. I myself am not aware of any case and counsel could not refer us to any case, where a ship has been held unseaworthy from the fact that the stowage of one parcel of cargo necessarily damaged another, except in cases where the bad stowage endangered the safety of the ship and so caused the damage, as in *Kopitoff* v. *Wilson* (1), where the bad stowage of armour plates allowed them to make holes in the ship's side; or where the temporary condition of the ship made her unfit to carry the cargo safely, as in *Tattersall* v. *National Steamship Co.* (2), where the hold for cattle was infected with bacilli of foot and mouth disease; or the condition of the permanent equipment made her so unfit, as in *Stanton* v. *Richardson* (3), where the pumps were not fit to drain a wet sugar cargo contracted to be carried; or in *Ciampa* v. *British India Steam Navigation Co.* (4), where the absence of a bill of health caused cargo to be fumigated and damaged. But where the ship herself is fit for the cargo contracted to be carried, if carefully stowed, but sails in an unfit condition as a cargo-carrying and loaded vessel because other cargo is improperly stowed so as to damage the contract cargo, in my opinion that condition is bad stowage, and is not a breach of an obligation to provide a seaworthy ship. I think indeed the cargo owner's counsel admitted this view of the law, but argued that here there was defective equipment of the ship, or stowage which affected the safety of the ship.

The contention as to defective equipment was I think based on the assumption that a ship with a deep hold should carry with her beams wooden or iron fifty feet long to go athwart the hold, if it was desired to stow heavy cargo on the top of cargo which would be damaged by weight. For the fore and aft boards of any platform there was an ample supply of shifting boards. There was no evidence that ships of this class ever carried such lengthy beams as part of their

(1) 1 Q. B. D. 377.
(2) 12 Q. B. D. 297.
(3) L. R. 9 C. P. 390.
(4) [1915] 2 K. B. 774.

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equipment, and it cannot be said that ships of this class, duly classed at Lloyd's, are unseaworthy. The cargo on this bill of lading could have been safely carried in this ship. The reason why it was damaged was the way in which other cargo was stowed so as to damage it. Ships carrying weight cargoes constantly sail with holds not filled, because it would not be safe for them to fill their holds. Either lighter cargo, which was available, or less bags of kernels should have been stowed on the top of the casks. Rowlatt J. has apparently found that the ship was not seaworthy when she started, because the hold was not prepared in a particular way so as to separate one part of the cargo from the other and prevent damage. This finding might have been made in *The Thorsa* (1), but it was held in that case that this fact was not enough to make the ship unseaworthy. I am of opinion that the evidence here does not prove any defect in equipment usually and reasonably carried by such a ship.

It was further argued that the ship as stowed was dangerous to herself, because the casks might leak, and block the pumps and so cause a dangerous list. This, I think, is far too remote. The casks did leak. The leakage was not at once pumped overboard, because the master did not think it right or necessary to pump overboard freight-paying cargo. In colder water some of the oil congealed and could not be pumped, and it occasioned a slight list. But the list was never dangerous; it could have been corrected by the use of the filling tank, but it was never necessary to use it. Both grounds therefore on which it was suggested that the ship was unseaworthy fail.

If the ship was not unseaworthy, it is not disputed that the exceptions protect the shipowner. This renders it unnecessary to consider what would have been the effect of a finding of unseaworthiness, in view of the express exception on that point. But I cannot accept the view of Rowlatt J. that the exception of unseaworthiness was limited to matters mentioned in the set of exceptions beginning "collision," which he bases on a limited construction of the word "clause"

(1) [1916] P. 257.

in that exception. In my view the use of the word "clause" in clause 1 (1), the last sentence in clause 2, clause 4, and the wording of clause 11, show that the word "clause" in the place in question is intended to apply to the whole of clause 2.

Like many other judges I desire to protest against the extremely illegible condition of this bill of lading. Shipowners have had a good deal of warning from the Courts, and some day they will find themselves deprived of the protection of their exceptions on the ground that they have not given reasonable notice of them as terms of the contract.

The above considerations lead to the conclusion that the charterers, with whom in my opinion the bill of lading contract was made, and who include the first three defendants, were protected by the exceptions in their bill of lading. But it was argued that the fourth defendant, the owner, was liable in tort because he was not a party to the bill of lading and therefore could not claim the benefit of the exceptions contained in it, but was a bailee liable for negligence—i.e., bad stowage. To this counsel for the owner made reply that the owner in the case of a time charter like the present one was not in possession of the goods. This in my opinion is contrary to all the authorities, of which *Omoa Coal Co.* v. *Huntley* (2) is a type. The real answer to the claim is in my view that the shipowner is not in possession as a bailee, but as the agent of a person, the charterer, with whom the owner of the goods has made a contract defining his liability, and that the owner as servant or agent of the charterer can claim the same protection as the charterer. Were it otherwise there would be an easy way round the bill of lading in the case of every chartered ship; the owner of the goods

(1) Clause 1 contained words exempting "the company" from liability for loss of goods beyond the value of 20*l.*, and for loss of certain specified goods, unless in either case the nature and value of the goods were declared; and limiting their liability in any case to the amount of the invoice price or declared value. The clause continued: "The stipulations in this clause shall apply in all cases in which under this bill of lading but for this clause the company would be liable for the loss or damage of such goods if accepted by it in proportion to their full value."

(2) 2 C. P. D. 464.

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would simply sue the owner of the ship and ignore the bill of lading exceptions, though he had contracted with the charterer for carriage on those terms and the owner had only received the goods as agent for the charterer. In *Hayn* v. *Culliford* (1), referred to by the Court, the charterer was not protected by his bill of lading, and it was useless for the owner to claim the benefit of the bill of lading, or say he held under its terms. If he held on the terms of the bill of lading its terms did not protect him.

For these reasons in my view the appeal should be allowed and judgment entered for the defendants with costs here and below. Of course the real question is which set of underwriters should bear the loss.

EVE J. In November and December, 1919, the plaintiffs shipped at Sherbro on the West Coast of Africa and Conakry in French Guinea 297 casks and 138 butts of palm oil for carriage on the steamship *Grelwen* to a United Kingdom port.

On arrival at Hull in January, 1920, many of the casks and butts had been so crushed and broken that their contents had leaked out, and in this action a claim is made to recover a sum of 6900*l.* odd by way of damages from the three first defendants as charterers and from the fourth defendants as owners of the ship. The claim is based on the allegations (1.) that the vessel was unseaworthy in that she was structurally unfit $\frac{\text{and}}{\text{or}}$ not properly equipped for the carriage of the goods and (2.) that the defendants were negligent in and about the stowage, custody, and care thereof. The negligence asserted on the hearing of these appeals was the imposition on the top of the tiers of casks and butts of an excessive weight of palm kernels in bags without erecting in the holds any platform or temporary deck to protect the casks and butts from the excessive weight. The absence of a temporary platform or deck constitutes the structural unfitness relied upon as proving that the vessel was unseaworthy.

(1) 4 C. P. D. 182.

The defendants deny the unseaworthiness, and not admitting any negligence in stowage, custody, or care of the goods, rely upon certain exceptions in the bills of lading as protecting them even if negligence be found.

It was sought at the trial to make out a case that the collapse of the butts and casks and the consequential loss or destruction of their contents were due to their inherent weakness attributable to age and exposure, and the greater part of the time occupied in the hearing was directed to evidence upon this issue, but the learned judge has found, and, in my opinion, no other finding was possible upon the evidence, that they succumbed to the excessive weight imposed upon them. Against this finding no argument has been advanced on the appeal, and we have to decide between the parties on the footing that an unreasonable and excessive weight was in fact imposed on the butts and casks and that the destruction and damage which resulted was the direct consequence of that imposition.

In these circumstances three questions arise for consideration: the first, was the ship unseaworthy, that is, unfit to carry these butts and casks, or was the imposition of this excessive weight bad stowage? The second, What is the true construction of the exceptions relied upon by the defendants? And the third, What protection, if any, is afforded thereby to the defendants?

The following appear to me to be the relevant facts about which there is now no dispute. The *Grelwen* is of a well-known type, a single deck ship with a shelter deck and with holds some twenty-five feet in depth; she is without stringers and is not fitted with scantling fastened to the frames or any other device for rigging up a temporary 'tween deck in the holds. Palm oil is a prominent feature in West African cargoes and the ships that normally bring it are 'tween deck vessels. Palm kernels in bags are constantly shipped with palm oil. All the Elder Dempster ships employed in the West African trade have 'tween decks, but during the war two ships that had no 'tween decks carried palm oil in casks to Hull; one of them was the *Athelstan* and the other may have

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been the Belgian boat spoken of by Captain Coysh. There is no satisfactory evidence as to how the casks were stowed in the *Athelstan*, but it is proved that the cargo in the Belgian boat arrived in very much the same condition as the one with which we are now dealing. The oil is brought in casks and the proper place to stow them is at the bottom of the hold; they ought not to be stowed in more than three tiers, and in that case the space between the top tier and the 'tween deck may be packed with two layers of palm kernel bags; if four tiers of casks are stowed the risk of collapse is increased, but there is no space for any kernel bags on the top of the fourth tier.

These facts were supplemented by the evidence of Captain Cockrill who, when asked in chief, "Would you say speaking from your experience that the vessel was a seaworthy vessel?" answered "No—she was unseaworthy"; of Mr. Peel who was asked, "Do you consider that this was a suitable vessel for the carriage of the palm oil?" and answered "In the lower holds certainly not"; and of Mr. Heaton who, when invited to express his view about the erection of a temporary 'tween deck, replied: "If it was determined to put oil down below in a hold to the height of three casks and stow palm kernels on top, some erection should have been made to keep the weight off the casks. It is perfectly sure there would be trouble, for some of the casks would collapse. I have never seen an erection made in the West African trade, but I have never been in a ship that had a 26 foot hold to stow oil in." I cannot find that any of these answers were challenged in cross-examination.

On these materials the learned judge came to the conclusion that the ship was unseaworthy. He sums it up by pointing out that there remained above the highest tier of casks a space for cargo some twelve to fifteen feet in depth and that unless a feather weight cargo was stowed in that space the hold was not of a character in which the casks and butts could have been stowed. "Therefore," he concludes, "it is a hold in which you cannot put these casks at the bottom which is the place to put them." Then he adds: "It could have

been made proper for the stowage of such a cargo by the erection of what has been called a temporary 'tween deck or a platform which would tend to keep the weight of the superincumbent cargo off the barrels. That could have been done and then the hold would have been fit to receive this cargo."

The question is: Ought we to dissent from that conclusion? In the first place there was evidence to justify it, and although it may be said that the conclusion is perhaps more in the nature of an inference from facts than a finding of fact itself, the Court of Appeal in *Upperton* v. *Union Castle Line* (1) treated the question whether the damage to the passenger's baggage was due to unseaworthiness or to negligent stowage or a negligent act on the part of one of the crew as a question of fact, and it appears to me we ought not to disregard the evidence to which I have already referred. It certainly goes some way to establish the proposition that in order to be seaworthy for the purpose of carrying palm oil in casks the ship must be fitted with a permanent or temporary 'tween deck and that the deep hold of a single deck ship is not a fit receptacle for such a cargo unless equipped with the means for keeping any superimposed cargo from resting on the tiers of casks.

It cannot be denied that the distinction between unseaworthiness and bad stowage is in some cases a very fine one, but there is a distinction, and I think it is well illustrated by a comparison of this case with a case like *The Thorsa* (2), where a hold already half packed with chocolate was filled up with a cargo of gorgonzola cheeses and the damage to the chocolate resulting from the packing of these two commodities in one hold was held to be due to improper stowage and not to unseaworthiness. It could not be said there that the hold was not as fit a receptacle for carrying chocolate as it was for carrying the cheeses. It was a fit receptacle for either but not for both together, but putting them both together did not render it in any way a less fit receptacle for either. The damage therefore did not arise from any

(1) 9 Com. Cas. 50. (2) [1916] P. 257.

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defect in the ship's equipment, but solely from the improper placing of the two cargoes in the same hold. Here it is different. The bottom of the hold is the only proper place to stow the casks; the hold is not fit for the casks because, assuming they are stowed, as they should be, in three tiers only, no greater weight can safely be imposed on them than would be represented by the weight of a fourth tier, and if they be stowed in four tiers nothing can safely be placed upon them. But it is idle to suppose that the charterers will be sending the ship to sea with only three tiers of casks plus the equivalent in weight of a fourth tier in the hold, and therefore it is that the hold becomes unseaworthy unless it be so equipped as to allow the space above the casks to be utilized without injury to the casks.

On the whole I have come to the conclusion that the learned judge's finding on the issue of unseaworthiness was right, and that the first question I have propounded ought to be answered by saying that the damage complained of was occasioned by unseaworthiness.

On the second question which relates to the construction of clause 2 of the bill of lading I am constrained to differ from the learned judge. The construction he has adopted involves the imposition in the last sentence of clause 2 on the word "clause" of a meaning different from that admittedly attaching to it in every other place—and there are several—where it is used in the document. Such a departure from well recognized canons of construction could only be warranted by a context clearly compelling one in that direction. No such context can be indicated here, and in my opinion the expression "this clause" means the whole of clause 2 and nothing less.

There remains the question whether the exceptions afford any protection to the defendants. I do not think they do. I agree that there is no express warranty of seaworthiness in the bill of lading and that the warranty which thereupon arises by implication is not controlled by the exceptions. I also agree that there is no evidence that all such reasonable

means to provide against unseaworthiness as are contemplated by clause 2 were in fact taken.

It follows that in my opinion both these appeals fail and ought to be dismissed.

Appeals dismissed.

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Solicitors for appellant: *Lawrence Jones & Co.*

Solicitors for respondents: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

W. H. G.

[IN THE COURT OF APPEAL.]

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Emergency Legislation—Ship—Charterparty—Voyage directed by Government—Claim of Compensation by Charterers—Interference with Business—Enforcement of Regulation of general Application—Indemnity Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 48), *s.* 2, *sub-s.* 1 (*b*), 2 (iii.) (*b*); *Schedule, Part II.*

By s. 2, sub-s. 1 (*b*), of the Indemnity Act, 1920, any person who has, otherwise than by requisition of a ship, "sustained any direct loss or damage by reason of interference with his . . . . business . . . . through the exercise . . . . during the war of any power under any enactment relating to the defence of the realm . . . . shall be entitled to payment or compensation in respect of such loss or damage."

By sub-s. 2 (iii.) (*b*), if the claimant would apart from the Act have no legal right to compensation, the compensation is to be assessed according to the principles set forth in Part II. of the Schedule to the Act.

By Part II. of the Schedule, "The compensation to be awarded shall be assessed by taking into account only the direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business, and nothing shall be included in respect of any loss or damage due to or arising through the enforcement of any order or regulation of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war."

A shipping company, whose ordinary business it was to run a line of steamers to the Mediterranean, chartered a ship for the purpose of its being employed on that business. By the charterparty it was provided by clause 32 that if during the currency of the charter the ship was directed by the Government for some voyage the direction was to be for the charterers' account. During the currency of the charter the Government directed the ship to go on a voyage to Cuba. That voyage was unprofitable to the charterers, and they lost the profits which they would have made if she had been used for the Mediterranean trade.

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The charterers did not charter another ship in substitution for the ship so directed, as in consequence of the rise of charter rates owing to the war they found it impracticable to do so. The charterers claimed compensation under the Indemnity Act, 1920, for the loss sustained by them by reason of the interference with their business by the Government direction:—

Held, that the charterers were not entitled to compensation for the loss:—

By Bankes L.J. Upon the ground that it was excluded by the terms of Part II. of the Schedule as being a loss "arising through the enforcement of . . . . a regulation of general . . . . application."

By Warrington and Scrutton L.JJ. Upon the ground that the charterers, by agreeing to the insertion in the charterparty of clause 32 in the anticipation of a possible Government direction, made the prosecution of the directed voyage a part of their business, and thereby precluded themselves from contending that the direction when given was an interference with their business by Government action within the meaning of s. 2, sub-s. 1 (*b*).

By Scrutton L.J. Also on the ground that the loss resulted from its being unprofitable to employ another ship in consequence of the high charter rates "due to the existence of a state of war," and was therefore excluded by Part II. of the Schedule.

Appeal from the War Compensation Court.

The claimants, the Moss Steamship Co., were the owners of a line of steamers in the Mediterranean, Black Sea, and Egyptian trade. On July 16, 1919, they chartered from the Adam Steamship Co. the steamship *Abelour* on time charter for fifteen months. The charterparty fixed the trade within the limits "United Kingdom, Continent, Black Sea, Mediterranean Trades, including Egypt to United States of America and United Kingdom, and for other trades as per owners' warranties attached." The charter, which was on the usual terms of a time charter, not a demise of the vessel, contained a provision in clause 32 that: "If during the currency of this charter steamer is directed by the British Government . . . . for some voyage or voyages this direction is to be for charterers' account and this charterparty with all its conditions to remain in force between the charterers and owners. Should steamer be requisitioned by the British Government this charter to be null and void." By a regulation 39 B B B made in July, 1917, under the powers conferred by the Defence of the Realm Act the Shipping Controller was empowered to make orders restricting or giving directions with respect to

the nature of the trades in which ships are to be employed, including directions requiring ships to proceed to specified ports, and by reg. 39 D D made in February, 1919, British ships were prohibited from proceeding to sea without a licence of the Shipping Controller. The Shipping Controller acting under the powers conferred by those regulations on January 3, 1920, refused a licence to the *Abelour* to proceed to the Mediterranean and directed the Adam Steamship Company to send her to Cuba to load a cargo of sugar. There being no requisition of the *Abelour* there was no hire payable by the Government to the claimants, who had to pay the full charter hire to the owners, whereby they lost the sum of 14,758*l.* They also lost the profit, amounting to 6198*l.*, which they would have made if the ship had been allowed to make the voyage to the Mediterranean which had been intended. The claimants were unable to minimise that loss by hiring another ship in substitution for the *Abelour*, as it was impracticable to do so owing to the high rate of hire ruling at the time. The claimants sought to recover the above two sums as compensation under s. 2, sub-s. 1 (*b*), of the Indemnity Act, 1920, for a direct loss by reason of interference with their business through the exercise during war of a power under enactments relating to the defence of the realm. The majority of the Compensation Court found that: "The charterer's business was that of a carrier of goods by their line of steamers to the Mediterranean, Black Sea and Egypt, and the *Abelour* was chartered as a vehicle for carrying on that business and no other." They held on the authority of *Elliott Steam Tug Co.* v. *Shipping Controller* (1) that the direction to the owners to send her on a voyage for which she was not chartered was an interference with the business of the charterers which directly caused a loss to them of money thrown away and profits, and accordingly awarded to the claimants the two sums claimed. The dissentient member of the Court distinguished the *Elliott Steam Tug Case* (1) on the ground, amongst others, that the charter there did not contain a clause similar to clause 32, and he

(1) [1922] 1 K. B. 127.

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was of opinion that the effect of that clause was to make the Cuba voyage a part of the charterers' business, so that the loss flowed from their own contract and not from interference by the Controller.

The Board of Trade appealed.

Mackinnon K.C., *Sir Ernest Pollock K.C.* and *Darby* for the Board of Trade. The direction complained of was not an interference with the claimants' business, for that business included a contemplated possible direction by the Government for which provision was made in the charterparty. That fact distinguished the case from the *Elliott Steam Tug Case.* (1)

Sir Leslie Scott K.C. and *Le Quesne* for the claimants. The Court are not entitled to hold that the direction of the voyage to Cuba was not an interference with the claimants' business, for the majority of the Compensation Court have found as a fact that that voyage was no part of their business, which was to carry to the Mediterranean, Black Sea, and Egypt and nowhere else. Then if it was an interference with their business the *Elliott Steam Tug Case* (1) is an authority that the loss resulting therefrom was direct loss within the meaning of the Act. Secondly, if the directed voyage was not a part of the charterers' business, the fact that the owners and charterers agreed inter se that the latter should not look to the former for recoupment of any loss they might sustain in the event of a direction being given cannot affect the rights of the charterers against the Government. It is res inter alios acta. Even if the clause had not been inserted the position would have been the same, the Cuban voyage would have been the charterers' loss. And under those circumstances it is not correct to say, as was said by the dissentient member of the Compensation Court, that the loss flowed from the charterers' contract and not from Government's interference. If a ship is detained by a foreign power she is not the less subject to a restraint of princes because by the terms of the charterparty the loss is to fall on the charterer.

(1) [1922] 1 K. B. 127.

Bankes L.J. Before I deal with the facts of this case I wish to say a word about *Elliott Steam Tug Co.* v. *Shipping Controller* (1), because I think that case has been supposed to have decided something more than it really did decide. There a tug was chartered to the claimants for an indefinite period on very favourable terms, the charterers having the option of determining the charterparty at any time by giving fourteen days' notice to the owners. The tug was requisitioned by the Government and was under requisition for a considerable time. The charterers having a favourable charter thought it was to their interests not to determine it, so that they might have the use of the tug when the requisition ceased. In these circumstances they claimed compensation for loss of profits which they would have made by the use of the tug during the period of the requisition. The Compensation Court awarded them compensation for loss of profits for thirty days, considering that they were entitled to that time to consider their position, but refused them any further compensation for loss of profits after the thirty days on the ground that they ought to have minimized their loss by putting an end to the charter, in which case they would no longer have to pay hire to the owners. The case then came to this Court, and the only point discussed was whether upon the facts the charterers had proved any "direct loss" to their business within the meaning of s. 2, sub-s. 1 (*b*), of the Indemnity Act, 1920. It was contended for the respondent that there was no direct loss at all, but that if there was, inasmuch as compensation was to be awarded upon the principles upon which the Commission had hitherto acted and as the Commission had never previously allowed loss of profits, it could not be recovered. Warrington L.J. and I both thought, contrary to the opinion of Scrutton L.J., that the loss of profits claimed by the charterers was a "direct loss" within the meaning of the sub-section. No question was raised before us upon the construction which ought to be put upon the language of Part II. of the Schedule. But as from the judgment of the Compensation Court it was doubtful

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whether they had refused to allow compensation for loss of profits after the thirty days on the ground that it was not a direct loss, in which case the majority of this Court thought they were wrong, or on the ground that the allowance of such loss would have been in contravention of the express language of Part II. of the Schedule, we remitted the case to them so that they might find the necessary facts relating to that question. (1)

I pass now to consider the facts of the present case. The claim is by the Moss Steamship Company for compensation for direct loss which they have sustained by interference with their business under the following circumstances. The claimants, who run a line of steamers to the Mediterranean, chartered the steamship *Abelour* on a time charter for fifteen months dated July 16, 1919. At that time Regulations 39 B B B and 39 D D were in force, the former having been made in 1917 and the latter early in 1919. After the passing of those regulations it appears to have become the practice for persons entering into charterparties, whether owners or charterers, to insert in the contracts some provision as to what was to happen in the event of the vessel being requisitioned or directed upon a particular voyage, it being uncertain at the date of the contract whether the requisition or the directed voyage would turn out profitable or not. In the present charterparty it was provided by clause 32 that: "If during the currency of this charter steamer is directed by the British Government . . . . for some voyage or voyages this direction is to be for charterers' account, and this charterparty with all its conditions to remain in force between the charterers and owners." The vessel was subsequently directed by the

(1) The Compensation Court reported that the claimants would in normal times have had no difficulty in hiring another tug in substitution for the *Frank*, and would consequently have suffered no loss; that they failed to obtain another tug at a commercially practicable rate; and that that fact was due not to the requisition of the *Frank*, but simply and solely to the existence of a state of war. The Court of Appeal, while declining to attempt any definition of the language of Part II. of the Schedule, held that upon the above facts it was impossible to say that the Compensation Court had gone wrong as matter of law, and dismissed the appeal.

Shipping Controller during the currency of the charter to proceed on a voyage to Cuba, instead of on the voyage which the charterers had contemplated, and which in the opinion of the Compensation Court would have been a profitable voyage. The directed voyage resulted in a substantial loss. The majority of the Compensation Court came to the conclusion that compensation was recoverable for that loss, being of opinion that, on the authority of the *Elliott Steam Tug Case* (1), it was to be treated as a direct loss by reason of interference with the charterers' business. I am quite prepared to deal with this case on the footing that the charterers' business included the chartering of vessels to take the place of any of their regular line which for some cause or other were not available, and the working of such vessels when chartered, and I am quite prepared to adhere to my view expressed in the *Elliott Case* (1) that a loss of profit experienced by charterers as the result of such interference would be a direct loss within the meaning of s. 2, sub-s. 1 (*b*), provided it satisfied the other conditions of the statute. In the present case three questions of law arise for decision upon the facts stated by the Compensation Court. First, was there any interference with the business of the charterers through the exercise or purported exercise during the war of any power under any enactment relating to the defence of the realm or any regulation made or purporting to be made thereunder? Secondly, if there was such an interference, was it a "particular interference" within the meaning of Part II. of the Schedule? And, thirdly, if there was an interference and it was particular, was the loss complained of due to the "enforcement of any order of general . . . . application"? Upon the first of those questions it was contended for the respondent that there was no interference with the charterers' business because, before the regulations were put in force in reference to this particular ship, the charterers had, in consequence of the making of the regulations, decided to carry on their business so far as this particular ship was concerned in a certain way,

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that is to say, to treat any voyage which she might be directed to undertake as being undertaken on their own account; and it was said that the voyage when so undertaken was not the result of any interference with their business, but was brought about by their own voluntary act done in anticipation of the regulation being applied to this particular ship. Speaking for myself, I think there is great force in that argument, and if it were necessary to do so I should be prepared to accept it and act upon it. But I prefer to rest my judgment upon a different ground which I will deal with presently. Upon the second question, whether, assuming that the direction was an interference, it was a "particular interference," I do not propose to say anything, because the true interpretation to be put on those words may have to be considered in some later case and I do not wish to say anything which may embarrass the tribunal in dealing with a claim which may depend upon facts very different from those in the present case. But I may say that in all cases falling within s. 2, sub-s. 2 (iii.) (*b*), that is to say cases in which there would be no legal right apart from the Act, special attention must be directed to the language of Part II. of the Schedule; for that is the part of the Act to which you must look to ascertain the principles upon which compensation is to be assessed in such cases. Although a particular claimant may be prima facie entitled to compensation under s. 2, sub-s. 1 (*b*), on the ground that he has sustained a direct loss by reason of interference with his business through the operation of a regulation made under an enactment for the defence of the realm, if you find, when you come to consider Part II. of the Schedule, that his claim is not covered by the language of that Part his claim to compensation will fail. It provides that: "The compensation to be awarded shall be assessed by taking into account only the direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business." It does not define what is meant by direct loss by direct and particular interference, but it indicates certain kinds of loss which are to be excluded from consideration, one of which

is loss "arising through the enforcement of any order or regulation of general . . . . application." That brings me to the third question, Assuming that the loss here was a direct loss caused by a particular interference with the charterers' business, was it due to the enforcement of a regulation of general application? I think that it was, and it is on that conclusion that I prefer to found my judgment. Those words appear to me to cover this case completely, whether it be looked at from the point of view of the charterers having anticipated its application by the manner in which they conducted their business, or from the point of view of its actual application to their particular case. In either view the loss was due to the enforcement of a regulation of general application. On that ground I think that the majority of the Compensation Court were wrong in awarding the compensation claimed, and the appeal should be allowed.

Warrington L.J. I am of the same opinion, but I prefer to base my judgment on what I think is the proper inference to be drawn from the facts with reference to the question whether the claimants' loss was caused by interference with their business through the exercise by the Shipping Controller of the powers conferred upon him by the regulations complained of within the meaning of s. 2, sub-s. 1 (*b*). The facts as found by the tribunal, and which I unreservedly accept, are that the regular and ordinary business of the claimants consisted in trading to Egypt and the Mediterranean, and that the *Abelour* was expressly chartered for that business. If those facts stood alone it might well be that the claimants' loss was the result of an interference with that business. But then we are faced with another fact, that the parties to the *Abelour's* charter contemplated the possibility of her being directed by the British Government on a voyage different from that which she would undertake if she were employed on the charterers' ordinary business, and they accordingly made special provision in the charterparty that if she were so directed the voyage should be on the charterers' account, in other words they determined in anticipation of such a

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direction that if she were so directed their business should be carried on in such a way as to include that voyage. If that be so it cannot be said that the direction when it took place involved an interference with their business, for it became part of their business to comply with the direction, and take the chance of its turning out profitable or the reverse. It in fact turned out unprofitable and they sustained a loss, but they sustained it as a business loss incurred in the prosecution of their business in the particular way in which, in regard to this ship, they contemplated that it would be prosecuted. Therefore it seems to me that there was no direct interference with their business. With regard to the Schedule I should like to reserve my view as to what is meant by "damage due to or arising through the enforcement of any order or regulation of general or local application." I think it is unnecessary to express a definite opinion upon that, for it seems to me sufficient to found my decision upon the language of s. 2, sub-s. 1 (*b*). But I should like to say this, that if it is contended that the insertion of clause 32 in the charterparty was a consequence of the possibility of a direction being given under regs. 39 B B B and 39 D D, and that the loss of which the claimants complain results from the insertion of that clause, then I think that any interference that they might rely upon in that view of the case would not be a particular interference with their business, but the loss would be due to the apprehension of such interference by reason of the general powers vested in the Government, and that, it seems to me, would be excluded by the terms of Part II. of the Schedule. I agree that the appeal must be allowed.

Scrutton L.J. My own private opinion is still that which I expressed in the *Elliott Steam Tug Case* (1), that compensation for Government action on requisitioning a ship is to be assessed to the owner according to the principles in Part I. of the Schedule, and that any loss to the charterer, who has only a contractual right in the ship, cannot be given in addition under Part II. That, if I were at liberty to act on it,

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would be an answer to the charterers' claim here; but I am precluded from acting on it by the decision of the majority in the *Elliott Case* (1), and I must assume that a charterer is entitled to recover for a direct loss to his business under Part II. But in this case I think that he does not show such a loss, and for two reasons—first, the loss is occasioned by the fact of his own contract binding him to carry out the direction on his own account, and secondly, the loss results from the fact that it was not profitable to employ a substituted ship in the business because of the high rates charged for ships owing to the existence of a state of war. I agree that the appeal should be allowed.

Appeal allowed.

Solicitor for the Board of Trade: *Treasury Solicitor.*
Solicitors for the claimants: *Hill, Dickinson & Co.*

J. F. C.

Dicta of Bankes and Scrutton, L.JJ., at pp. 464, 466, *applied.* Minister of Materials *v.* Steel Bros. & Co., Ltd. [1952] 1 All E.R. 522.

[IN THE COURT OF APPEAL.]

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Dec. 19, 20.

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[1921. S. 6238.]

Sale of Goods—Sewing Cotton Contract Note—Conditions, Construction of.

A contract for the sale of goods contained the following condition: "The goods delivered shall be deemed to be in all respects in accordance with the contract, and the buyers shall be bound to accept and pay for the same accordingly unless the sellers shall within fourteen days after arrival of the goods at their destination receive from the buyers notice of any matter or thing by reason whereof they may allege that the goods are not in accordance with the contract":—

Held, that the words "and the buyers shall be bound to accept and pay for the same" were words of limitation limiting the purposes for which the goods were to be deemed to be in accordance with the contract, and that while omission to give notice within the specified time that the goods were not in accordance with the contract would deprive the buyers of their right to reject them or to claim a diminution of the price, it left untouched their right to claim damages for the breach of contract.

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APPEAL from the judgment of Lord Hewart C.J. at the trial.

The plaintiffs were merchants carrying on business at Petrograd and also at Manchester. The defendants were manufacturers at Manchester. By a contract dated January 23, 1920, the defendants sold to the plaintiffs 2000 gross of "200 yard reels of sewing cotton f.o.b. English Port." The contract contained the following among other conditions:—

"4. The sellers only bind themselves to deliver goods in accordance with the general description under which they are sold and they do not guarantee their suitability for any special purpose."

"5. The goods delivered shall be deemed to be in all respects in accordance with the contract and the buyers shall be bound to accept and pay for the same accordingly unless the sellers shall within fourteen days after arrival of the goods at their destination receive from the buyers notice of any matter or thing by reason whereof they may allege that the goods are not in accordance with the contract."

On February 5, 1920, the plaintiffs entered into a similar contract with the defendants for the purchase from them of a further quantity of 3000 gross of 200 yard reels upon the same terms and subject to the same conditions. After making the said contracts the plaintiffs changed their mind as to the place of delivery and requested the defendants to deliver the goods at certain warehouses in Manchester instead of delivering them on board ship, as provided by the contract. The defendants accordingly between the months of February and May, 1920, delivered them at the warehouses specified, where owing to the general depression of trade the plaintiffs allowed them to remain until May, 1921, when they shipped 186 gross to customers in Russia. The reels, as received from the defendants and as provided by the contracts, were packed in cases each containing twenty gross. Each reel had a label pasted on the end of it bearing the words "200 yards." The plaintiffs had not examined the contents of the

cases while they were in the warehouses to ascertain whether they corresponded with the contracts.

Shortly after the arrival of the goods in Russia they received complaints from their customers that the reels delivered to them were not of the contract length but of an average of only 188 yards. The plaintiffs then caused the bulk remaining in the warehouses at Manchester to be tested, with the result that the bulk test showed that none of the reels were of a length of 200 yards, but varied from 184 to 190 yards. The plaintiffs then brought this action for damages for breach of contract. The defendants relied by way of defence on clause 5 of the Conditions above mentioned, to which the plaintiffs replied (inter alia) that the effect of the clause was only to take away the right to reject and did not preclude the buyers from bringing an action for damages. The Lord Chief Justice held that the effect was to deprive the buyers of all their remedies, the right to damages as well as the right of rejection. In the course of his judgment he referred to a case against the same defendants: *Colombo* v. *Beck & Co.* (1), turning upon the construction of the same clause, and heard before a Divisional Court presided over by himself on April 7, 1922. In that case, which was also an action for damages for breach of a contract of sale of sewing cotton, the breach complained of being that the goods were not of the stipulated shade or finish, the Court were of opinion that the provision in clause 5 that the goods should be deemed to be "in all respects" in accordance with the contract meant that they should be so deemed "for all purposes," including the deprivation of the right of action for damages, and that the words "and the buyers shall be bound to accept and pay for the same" indicated an independent consequence of the omission to give notice and not a limitation of the prima facie meaning of the preceding sentence.

The plaintiffs appealed.

Cyril Atkinson K.C. and *Lustgarten* for the appellants. Assuming that clause 5 applies to this case, the Lord Chief

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Justice put a wrong construction upon it. Where goods which have been sold by description are delivered not in accordance with the description the buyer has three remedies: he may refuse to accept them, or set up the breach in diminution of the price, or maintain an action for damages. The object of clause 5 was to take away the two first remedies only. It leaves the third remedy untouched. The words "shall be deemed to be in all respects in accordance with the contract" mean that the goods shall be so deemed for the particular purposes which follow—namely, the obligation to accept and to pay for them. If they meant that the goods should be so deemed for all purposes, the succeeding words "and the buyers shall be bound to accept and pay for the same" would be otiose; they might just have well been omitted. The word "and" in that sentence is not conjunctive but explanatory of what goes before, and is equivalent to "that is to say." As Fletcher Moulton L.J. said in *Wallis* v. *Pratt* (1), in a judgment which was expressly approved by the House of Lords (2), "It would require express language in any contract to indicate any intention of negativing a right to damages for the breach of an obligation imposed by it," and there is no such express language here. Secondly, clause 5 has no application at all to a case in which, as here, the goods delivered are not the contract goods. It was intended only to deal with breaches of warranty as to quality, not to override the fundamental obligation to deliver goods of the description contracted for. Here the goods contracted for were "200 yard reels." It was an essential condition that the reels should be of that length. In *Colombo* v. *Beck & Co.* (3) the Divisional Court indeed held that clause 5 did apply to the case before them; but there the breach complained of related only to the shade and finish of the thread, and amounted only to a breach of warranty, not of a condition. It was there found as a fact that the contract goods were delivered, and it was conceded by the Court that if they had not been delivered clause 5

(1) [1910] 2 K. B. 1003, 1016. (2) [1911] A. C. 394.
(3) Not reported.

would not have applied. In *Vigers* v. *Sanderson* (1), where the contract was for the sale of laths of certain specified lengths, and the laths delivered were of different lengths from those contracted for, Bigham J. held that a stipulation in the contract that in the event of a dispute the buyers should not reject the goods but refer the matter to arbitrators did not apply, for it could not be supposed that the parties intended that the sellers should be at liberty to deliver something wholly outside the contract description. Here it was a fundamental part of the contract that the reels should be 200 yard reels. The reels bore labels stating that the contents were 200 yards in length. That statement not being true the reels were unsaleable by reason of the Merchandise Marks Act, 1887, for by s. 2, sub-s. 2, of that Act it is made a criminal offence to sell any goods to which a false trade description is applied, and by s. 3, sub-s. 1: "The expression 'trade description' means any description statement or other indication . . . . (*a*) as to the . . . . measure . . . . of any goods." In *Shepherd* v. *Kain* (2), where the contract for the sale of a vessel described her as "copper fastened," but stated that she was to be taken "with all faults," and it turned out that she was only partially copper fastened, it was held that the vendor was liable for the breach of contract, for what was meant was that he was not to be responsible for any faults which the vessel might have consistently with her being the thing described. Thirdly, the "destination" of the goods, from their arrival at which the fourteen days were to run, meant the foreign port to which they were to be shipped. Destination must have meant something different from place of delivery, for that was on board ship and there could be no possible opportunity of inspection there. And the mere fact that the goods were temporarily warehoused pending shipment did not alter the place of destination.

Barrington-Ward K.C. and *Sir Harold Smith* for the respondents. With regard to the appellants' second point, that the goods delivered were not the contract goods:—no doubt where there is a sale of goods by description s. 13 of

(1) [1901] 1 K. B. 608. (2) [1821) 5 B. & Al. 240.

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the Sale of Goods Act provides that it is a condition that the goods shall correspond with the description. But the question is what is meant by "description"? There is no definition of that word in the Act. It must be understood that the goods will correspond with the description if they are of the same species—that is to say, of the same category of merchandise as the subject matter of the contract. Here the species contracted for was "sewing cotton." The length of the cotton on the reels was no part of the description. This is emphasized by the terms of clause 4 of the contract: "The sellers only bind themselves to deliver goods in accordance with the general description under which they are sold." Those words "general description" ought not to be enlarged so as to include measure of quantity. Then if there was no breach of condition and clause 5 applied, the buyers by omitting to give notice of the defect complained of barred themselves from all remedy. The goods are to be "deemed to be in all respects in accordance with the contract," and if those words are to receive their natural meaning all the buyers' remedies are gone, including the right to claim damages. The appellants' contention requires a most unusual meaning to be given to the word "and." If their contention is right the buyers may, notwithstanding clause 5, bring their action for damages at any time, however long, after delivery of the goods, provided it is less than six years. That can hardly be.

BANKES L.J. This is an appeal from a judgment of the Lord Chief Justice, who tried the action without a jury, and the question to be decided turns on the construction of certain contracts between the parties. By those contracts the defendants sold to the plaintiffs 5000 gross of reels of sewing cotton, which reels were described in the documents containing the contracts as "200 yard reels," and each reel as delivered was marked as being a 200 yard reel. The contracts were made in January, 1920, and it was thereby provided that the delivery should be "f.o.b. English port." It did not suit the buyers to take delivery in accordance with the terms of the contract, and the parties

mutually agreed to a variation of the contract to this extent that, instead of the goods being delivered f.o.b. they should be delivered into certain warehouses named by the buyers. They accordingly were so delivered and that delivery was completed by the end of May, 1920. The goods were allowed to remain in the warehouses for about fifteen months before any attempt was made to ship any of them, and then a small portion was shipped to Russia. On arrival there the goods were examined, and complaint was made that the reels did not contain 200 yards each. The bulk of the goods remaining in the warehouses were then examined, with the result that none of the reels were found to be 200 yard reels. Under those circumstances this action was brought to recover damages for the breach of contract. It is plain that the buyers had lost any common law right to reject the goods which they may have had, for they had paid for them, and also kept them in their possession for upwards of a year and thereby allowed the time within which any right of rejection might have been exercised to go by. The contracts contained a number of conditions of which one, clause 5, is material for the decision of the present case. It provides as follows: "The goods delivered shall be deemed to be in all respects in accordance with the contract, and the buyers shall be bound to accept and pay for the same accordingly, unless the sellers shall within fourteen days after arrival of the goods at their destination receive from the buyers notice . . . . that the goods are not in accordance with the contract." At once a difficult question arises on that clause as to what is meant by "arrival at their destination," but as I can conceive that this is a question which may cause difficulty in future cases I do not now wish to say anything which may embarrass the parties in such cases, but content myself with saying that I think the Lord Chief Justice had sufficient material on which to reach the conclusion which he did reach, that in this particular case the goods had arrived at their destination when they were put into the warehouses. But that is a minor point. The real question is whether, assuming that there was a breach

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of contract, clause 5 deprives the buyers of their right to sue the sellers for damages for that breach. Mr. Atkinson contends that it does not, and he does so upon two grounds. First he says that, upon the true construction of clause 5, it is a clause which deals with the right of rejection only, and not with the buyer's right of action for damages. Secondly he says that, where the goods delivered are not of the contract description, which he contends is the case here, the clause does not apply at all, for to treat it as so applying would be to defeat the whole object of the contract. He says that it is clear from the decision in *Wallis* v. *Pratt* (1) that where a buyer relies on the breach of a condition by the seller, although he may have lost his right to reject by reason of lapse of time or for some other cause, he does not thereby lose the right to treat the breach of condition as a breach of warranty and sue for damages, and it is no answer to a buyer relying on that right to say: "If your case had been one of breach of warranty instead of breach of condition there is a clause in the contract which would have deprived you of any right of action in respect of breach of warranty, and it must equally deprive you of that remedy when you treat the breach of condition as a breach of warranty." That seems to be what was decided by the House of Lords in that case, and with great respect to the Lord Chief Justice I do not think he has given sufficient effect to that decision. But in my opinion it is not necessary for Mr. Atkinson to rely on that contention, because I think his first point is sound, that clause 5 deals only with the buyer's right of rejection. I come to that conclusion for this reason. A buyer has, in the event of his seller breaking his contract, a prima facie right to avail himself of one or other of several alternative remedies, and if the seller desires by a clause in the contract to restrict the buyer's right to those remedies he must say plainly whether he intends to deprive the buyer in certain events of all those remedies or only of one or more of them, and if so of which. Here I think it is reasonably plain from the language of clause 5 that the intention was not to take

(1) [1911] A. C. 394.

away all his remedies. I think that the words "The goods shall be deemed to be in all respects in accordance with the contract and the buyers shall be bound to accept and pay for the same accordingly" must be read as one entire sentence dealing with the subject matter—namely, the right to refuse acceptance and payment. For the purpose of taking away that right, but for that purpose alone, the goods are to be deemed in accordance with the contract unless the required notice has been given. There is nothing in the language of the clause that even hints at the taking away of the buyer's right to an action for damages. I am not sure whether this decision is in conflict with the decision of the Divisional Court in *Colombo* v. *Beck & Co.* (1), for there the facts were different, and the claim was for breach of warranty not for breach of a condition. But from the language of the judgment in that case it certainly looks as if the Court there took a different view as to the construction of this clause, and if that is so I can only say I respectfully do not agree with it. For these reasons I think the appeal should be allowed.

WARRINGTON L.J. The defendants in this case sold to the plaintiffs 5000 gross of 200 yard reels of sewing cotton. They have delivered sewing cotton in reels of less than 200 yards in length. The plaintiffs sue them for damages for the breach of contract. The contention is that as the goods delivered were not in accordance with the description, and there was consequently a breach of the implied condition that they should correspond with the description, and as the buyers were no longer in a position to reject them by reason of the fact that they had already paid for them, and were consequently compelled to treat the breach on the part of the sellers as a breach of warranty, they were entitled under s. 53 of the Sale of Goods Act to maintain an action against the sellers for damages for the breach of warranty. They are met with the objection that they are precluded from maintaining the action by the terms of Clause 5. [His Lordship read the clause.] What is said in reply to that objection is that

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the clause means nothing more than that for the purpose of the question whether the goods are to be accepted and paid for they are to be deemed to be in all respects in accordance with the contract. I think that that contention on the part of the buyers is right, and that the true construction of the clause is that it does not debar the buyer from his action for damages for breach of the condition treated as a warranty. I may say by the way that when the clause says that the goods are to be deemed to be "in all respects" in accordance with the contract it does not mean that they are to be deemed to be so "for all purposes." The words are "in all respects," that is "in all matters affecting the quality, quantity and condition of the goods," so that they in reality add nothing to the meaning of the clause. I agree that the appeal must be allowed.

SCRUTTON L.J. I am of the same opinion. This is a contract for the sale of 5000 gross of 200 yard reels of sewing cotton of various counts to be delivered f.o.b. English port. The reels delivered were not 200 yard reels. They were so described on the labels attached to the reels, but they were in fact on the average of a length of less than 190 yards per reel. By arrangement between the parties the goods were delivered into warehouses instead of being put on board ship, and no examination was made of them for over a year. When they were examined they were found not to comply with the contract in the respect which I have mentioned, and the question then arose whether the buyers could claim damages. The sellers relied on a printed clause No. 5 on the back of the contract. Now I approach the consideration of that clause applying the principle repeatedly acted upon by the House of Lords and by this Court—that if a party wishes to exclude the ordinary consequences that would flow in law from the contract that he is making he must do so in clear terms. As Lord Macnaghten said in one case (1), an ambiguous clause is no protection. I have then to consider whether it is clear upon the terms of Clause 5 that if the goods are not in

(1) *Elderslie Steamship Co.* v. *Borthwick* [1905] A. C. 93, 96.

accordance with the contract a claim for damages is excluded unless notice of the defect is given within the specified time. The clause is obscurely drawn, but its interpretation becomes simpler if it be turned round, with the condition put first—thus, "Unless the sellers shall within fourteen days after arrival of the goods at their destination receive from the buyers notice" of some defect "the goods delivered shall be deemed to be in all respects in accordance with the contract." It is not very clear what is the destination in the case of goods to be delivered f.o.b., which cannot ordinarily be examined while being put on board ship. But, apart from the question of destination, if the clause stopped at the point down to which I have read the only question which, as far as I can see, could arise would be whether such a clause could apply at all where the goods delivered are not the goods contracted to be sold, whether for instance the buyer is bound to accept beans when he has bought peas if he has failed to give notice of the mistake within fourteen days after arrival of the goods at their destination. I can quite well see that that question might give rise to a good deal of argument on the lines of *Vigers* v. *Sanderson*. (1) The clause however does not stop there; it goes on "and the buyers shall be bound to accept and pay for the same accordingly." Therefore it mentions one particular consequence which would ordinarily follow where the goods delivered were not of the description stipulated in the contract—namely, that the buyer would have a right to reject the goods and refuse to pay for them, and it excludes that consequence. Having regard to that fact, and bearing in mind the principle I have stated, can I say that the sellers have used language which to the mind of an ordinary commercial man clearly excludes the buyers' right to claim damages as well as their right of rejection? It is matter of common knowledge that where goods are shipped to a foreign country the buyer not infrequently rejects them unreasonably and uses his rejection, coupled with the fact that the goods are a long way off, as a lever to extort a reduction in the price, and I cannot help

(1) [1901] 1 K. B. 608.

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thinking that the draftsman of Clause 5 had that difficulty in his mind, and the possible consequences of a rejection of the goods at their port of destination. But the claim for damages is a different matter if the goods have been accepted and the price paid, for the buyer has then got to sue for his damages in England, which is a much more satisfactory matter for the English seller than having to sue in a foreign country in Courts with which he is not familiar. I have come to the conclusion that the sellers in the present case have not clearly expressed their intention to exclude the buyers' right to claim damages in the circumstances which have happened. The judgment of the Lord Chief Justice seems to have proceeded on what in my opinion was an erroneous construction of the contract. He apparently relied upon the authority of *Colombo* v. *Beck & Co.*, the case before the Divisional Court, but I think the decision of the Divisional Court also was erroneous. This appeal must succeed.

Appeal allowed.

Solicitors for the appellants: *Pritchard, Englefield & Co., for Boots, Edgar & Rylands, Manchester.*

Solicitors for the respondents: *Dehn & Lauderdale.*

J. F. C.

UNITED DAIRIES, LIMITED *v.* PUBLIC TRUSTEE AND ANOTHER.

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Nov. 6, 7, 21.

[1920. U. 440.]

Landlord and Tenant—Lease—Covenant to repair—Assignment of Lease—Assignees Tenants in Common—Breach of Covenant—Extent of Assignees' Liability.

A lease containing a covenant to repair became, by assignment, vested in two tenants in common:—

Held, that the lessor was entitled to recover from either of the two tenants in common the full amount of the damages that might be found due for a breach of the covenant.

Norval v. *Pascoe* (1864) 34 L. J. (Ch.) 82 followed.

Merceron v. *Dowson* (1826) 5 B. & C. 479; 8 D. & Ry. 264 considered.

POINT of law raised by the pleadings tried by Greer J.

By an indenture dated August 20, 1919, the plaintiffs purchased from Lord Southampton all his reversionary interest in certain premises which by lease dated October 10, 1826, had been demised to one John Johnson the elder and John Johnson the younger, their executors, administrators and assigns, for a term of ninety-four years from September 29, 1825. That lease contained covenants by the lessees for themselves, their heirs, executors, administrators and assigns or some or one of them to keep the premises in repair during the term and to yield them up well and sufficiently repaired at the expiration of the term. After divers mesne assignments the lease became vested in 1888 in Lewis William Thomas and Alfred James Thomas as tenants in common. Lewis William Thomas died on April 12, 1919, and at the date of the conveyance to the plaintiffs in August, 1919, the lease was vested in the Public Trustee as executor of Lewis William Thomas, and in Alfred James Thomas as tenants in common. On the expiration of the lease of October 10, 1826, on September 29, 1919, the plaintiffs alleged that the premises were out of repair in breach of the covenant contained in the lease, and they sued the Public Trustee and Alfred James Thomas as tenants in common by assignment of the lease, claiming to recover from both the whole of the

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damages they alleged they had sustained by reason of the breach of covenant to repair.

Each defendant denied that the premises were out of repair and denied liability; but the Public Trustee, while denying liability, brought into Court the sum of 2000*l.* and said that that was sufficient to satisfy the plaintiffs' claim as against him. The other defendant paid in nothing. Each defendant having submitted by his defence "that the liability of this defendant is limited to one moiety of the damages claimed," that question was ordered to be set down for argument.

Wootten K.C. and *R. O. B. Lane* for the plaintiffs. The defendants' claim to limit their liability to one half the damages for breach of the covenant to repair is not sustainable in law. Each tenant in common is liable upon the covenant to repair to do the whole of the repairs, and if he fails to do so, to pay the whole amount of the damages found due in respect of the breach. On assignment the benefit and burden of the covenant run with the land. If the land comprised in the demise is severed, the covenant runs with each parcel separately assigned: *Congham* v. *King* (1) and *Stevenson* v. *Lambard* (2), but where there is no severance each tenant in common is liable on a separate covenant to the whole burden: *Norval* v. *Pascoe.* (3) A covenant to repair is indivisible where there has been no physical division of the property affected. The defendants' contention is that the obligation is to repair the demised premises as to an unascertained half. The mere statement of that proposition shows that it is untenable.

Merceron v. *Dowson* (4), which may be relied upon by the defendants, merely decided that one tenant in common when sued for breach of covenant to repair may claim to have the other tenants in common added.

Barrington-Ward K.C. and *H. C. Davenport* for the defendant, the Public Trustee. Each defendant is liable only for

(1) (1630) Cro. Car. 221.
(2) (1802) 2 East, 575.
(3) 34 L. J. (Ch.) 82.
(4) 5 B. & C. 479; 8 D. & Ry. 264.

a moiety of the damages. It is said for the plaintiffs that in such a case damages are not apportionable, but that is not so: see per Tindal C.J. in *Simpson* v. *Clayton* (1) and *Roberts* v. *Holland.* (2)

[GREER J. If one of two tenants in common becomes bankrupt, is the lessor to be limited to half the damages he may have suffered by a breach of covenant to repair ?]

That appears to be so. As Wills J. pointed out in *Roberts* v. *Holland* (2), each tenant has an undivided part, and the covenant becomes equivalent to a separate covenant on which separate actions can be brought. The first part of the headnote in the Law Journal report of *Merceron* v. *Dowson* (3) shows that the contemporary opinion of the profession was that one tenant in common was only liable to a proportionate part of the damages. The case of *Norval* v. *Pascoe* (4) has been much discussed. As was said of it by Kenny J. in *Dooner* v. *Odlum* (5), the reasoning of Kindersley V.-C. is not easy to follow and the case must be treated as depending on its particular circumstances.

[They also referred to *Gratton* v. *Wall* (6); *Orme* v. *Wills* (7); Platt on Leases, vol. ii., pp. 416 et seq.; and Halsbury's Laws of England, vol. xviii., p. 590.]

The defendant Thomas was not represented.

Wootten K.C. replied.

Cur. adv. vult.

NOV. 21. GREER J. read the following judgment: In this case by an order made under Order xxv., r. 2, I have to decide the point of law raised by para. 9 (*b*) of the defence of the defendant, the Public Trustee, and para. 8 (*b*) of the defence of the defendant, Alfred James Thomas. The action is one to recover damages against the two defendants as tenants in common by assignment of the interests of the lessee in certain land originally leased to the defendants' predecessors in title by lease dated October 10, 1826, for breach of covenant to

(1) (1838) 4 Bing. N. C. 758, 780–1.
(2) [1893] 1 Q. B. 665, 667.
(3) (1826) 4 L. J. (O. S.) (K. B.) 211.
(4) 34 L. J. (Ch.) 82.
(5) [1914] 2 I. R. 411.
(6) (1868) I. R. 2 C. L. 484.
(7) (1878) 2 L. R. Ir. 124.

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repair the leased property and to deliver up the same well and sufficiently repaired at the expiration or sooner determination of the term. The plaintiffs claim that they are entitled to a judgment against both defendants for the whole of the damages. The defendants plead respectively in the paragraphs of their defences above referred to that the liability of each of them is limited by law to one moiety of the damages. The question that I have to decide is whether tenants in common by assignment of the interests of a lessee are each liable in an action against both of them to have judgment entered against both for the whole amount of the damages, or whether there must be a judgment against each of them for one half of the damages only.

The question is one of some difficulty, and after examining a large number of authorities I have come to the conclusion that there is no actual decision on the point in the English Courts except *Norval* v. *Pascoe.* (1) As the decision is one that has been standing since 1864 I could content myself by saying that I decide the present case in the plaintiffs' favour on the authority of *Norval* v. *Pascoe* (1), but the decision is one that has been very much criticised, and it therefore seems to me desirable that I should investigate the question a little farther. Tenants who take a leasehold interest by assignment are not under any contractual obligation to perform the covenants of the lease. The original lessees and their representatives continue liable under the lease, but the law imposes upon the assignees while they are assignees a liability to perform the covenants contained in the lease by reason of what is called "privity of estate," that is to say, inasmuch as they take under the original lease they are liable to perform the covenants for the benefit of any person who succeeds to the title of the original lessor. Where the assignee is a single person who takes the whole of the leased property no difficulty arises. Where the leased property has been physically divided amongst two or more assignees it is clear that the obligations of the lease, so far as they affect the assignees, become separate, and each of the assignees is liable, while he is assignee, to

(1) 34 L. J. (Ch.) 82.

perform the covenants so far as they affect his divided part of the leased property: see *Congham* v. *King* (1); *Hare* v. *Cator* (2); *Curtis* v. *Spitty* (3); *Gratton* v. *Wall* (4); *Shee* v. *Gray* (5); *Orme* v. *Wills* (6); and *Dooner* v. *Odlum.* (7) In the latter case Kenny J., after referring to a number of cases, including *Norval* v. *Pascoe* (8); *Curtis* v. *Spitty* (3); *Shee* v. *Gray* (5); *Gratton* v. *Wall* (4); and *Orme* v. *Wills* (6), says this (9): "But, while many of those cases turned on points of pleading, it will be found that throughout all of them the principle was recognised that, in order to free the assignee of part of the lands from payment of the entire rent, he must hold the part in physical severalty. When he does so there is no privity of estate, as between him and the reversioner, in the entire of the lands. If the share be not held in severalty—whether it be held jointly or in common with others—he is owner with those others of the whole estate, and would be liable accordingly for the whole rent." I have looked at the Irish cases and they seem in my judgment to support the view expressed by Kenny J. in the words quoted; though it does not seem to me quite accurate to say that a tenant in common is an owner with others of the whole estate. Unlike a joint tenant, he is not a joint owner of the whole estate, but, inasmuch as he has a share of every part of the estate, it seems to me to be true to say that there is privity of estate between him and the landlord in the whole of the leased property. The view expressed by Kenny J. concerns a covenant to pay rent which in its nature is apportionable, and, of course, applies, if right, a fortiori to a covenant to repair which in its nature is not apportionable.

The present case was argued before me on the assumption that in English law, whatever may be the case in Ireland, a tenant in common is not liable for the whole rent, but only for a proportionate part, but I do not think this question appears to be definitely concluded by any of the decisions in the English Courts. In Leake on Contracts, 7th ed., 931, a

(1) Cro. Car. 221.
(2) (1778) Cowp. 766.
(3) (1835) 1 Bing. N. C. 756.
(4) I. R. 2 C. L. 484.
(5) (1864) 15 Ir. C. L. R. 296.
(6) 2 L. R. Ir. 124.
(7) [1914] 2 I. R. 411.
(8) 34 L. J. (Ch.) 82.
(9) [1914] 2 I. R. 430.

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view is expressed similar to that I have quoted from the decision of Kenny J. Bayley J. in giving judgment in *Holloway* v. *Berkeley* (1), a case dealing with heriots, points out that where there are tenants in common with undivided moieties there is only one tenement in the whole of which each tenant shares. Though there may in a sense be two estates, it is obvious that each tenant in common has an estate in the whole of the single tenement, and that as regards this estate there is privity between him and the landlord. There appears, therefore, to be no logical reason why a covenant which is imposed on him by the law based on privity of estate should not be co-extensive with his estate which is an estate in the whole of the tenement. Bayley J. goes on to say (2): "Where the tenement is subdivided, each tenant holds his share in severalty, and it is subject to nothing beyond its own services. In the case of a tenancy in common, the tenement is undivided; none of the tenants in common, be there what number there may, knows his own in severalty; the services, which in case of division would be divisible, remain entire, and the whole land is liable to all the services." Bayley J. is there dealing with the services which a freeholder may be called upon to perform, which, of course, may include a rent which is in itself divisible as well as other services which may be indivisible, but in either case his view is, apparently, that the tenant in common is under liability to perform the whole of the services. If this is right it is an authority in favour of the view that a tenant in common of leased land is liable for the whole rent, as I cannot see why there should be any distinction between the incidence of covenants running with the land on an assignment of freehold land and on an assignment of leasehold land. However, there is what seems at first sight decisive authority for the proposition that in England at any rate an assignee who is a tenant in common is only liable for his due proportion of the rent: see *Gamon* v. *Vernon* (3) and *Stevenson* v. *Lambard* (4); but if these decisions are closely examined it

(1) (1826) 6 B. & C. 2.
(2) Ibid. 11.
(3) (1678) 2 Lev. 231.
(4) 2 East, 575.

becomes apparent that they are not actual decisions on the question, and that they do not necessarily involve the proposition that a tenant in common cannot be sued for the whole of the rent. *Gamon* v. *Vernon* (1) was an action for debt against an assignee of an undivided moiety of the land for a moiety of the rent. It was moved in arrest of judgment that both the privity of estate and contract remained entirely in the lessee and the assignee was not chargeable, but the Court held that "the assignee having the entire estate in one moiety of the land, he hath the privity of estate sufficient to be charged by the lessor for the moiety of the rent if he will; and judgment was given for the plaintiff." It is not clear what the Court meant by the words "if he will." Dodd J. in *Dooner* v. *Odlum* (2) suggests that these words mean if he prefers to sue the assignee for half of the rent rather than sue the lessee for the whole, but this is by no means clear. The words may mean, if he is content to take half when he might take the whole he can do so; but in any event the case is not a decision that a tenant in common of a moiety of lands cannot be sued for the whole of the rent; it is only an authority that, if an action is brought for half the rent, it is no answer to say that he is only a tenant of a moiety. In *Stevenson* v. *Lambard* (3) the landlord claimed from the defendant the whole rent under a covenant in the original lease, alleging that all the right, title and interest in the term had vested by assignment in the defendant. The defendant pleaded (1.) non est factum, (2.) that all the interest and title of the original lessee did not vest by assignment in the defendant, (3.) no rent in arrear, and (4.) that, as to so much of the said supposed breach of covenant as related to the non-payment of half the rent, the defendant had been ejected by title paramount of one undivided moiety. To the fourth plea the plaintiff demurred. Judgment was given for the plaintiff on the demurrer, on the ground that the plea was bad, as it was a plea to the whole of the claim and was no answer to the whole of the claim. Judgment

(1) 2 Lev. 231.
(2) [1914] 2 I. R. 411, 415.
(3) 2 East, 575.

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was given for the plaintiff, and the defendant was given leave to amend his plea by pleading it only to one moiety of the rent. It was not necessary for the Court to decide anything more than that the plea as pleaded was bad, but it is quite clear from the judgment that Lord Ellenborough and the other judges thought that under these circumstances the covenant was divisible and that the defendant was only liable for half the rent. It may well be that where an assignee has been evicted from a portion of the land by title paramount he cannot be made liable for more than half of the rent, as he and the owner of the other moiety do not hold the same tenement. They occupy under different leases and are not in the same position as two tenants in common who take their title under a lease from the plaintiff or his predecessor in title. It seems to me on the authorities that it has never been conclusively established that an assignee holding with other tenants under the terms of the original lease is not liable jointly with those other tenants for the whole rent. He has an interest in the whole of the land leased, though it is only a partial interest; his estate extends over the whole of the land leased; and I see no valid reason why tenants in common should be in a position as regards liability for rent different from that of joint tenants. I am inclined to think that each of the tenants in common has the privity of estate with the landlord in the whole of the land leased.

However this may be, even if tenants in common are only liable for the duly apportioned part of the rent, it by no means follows that they are only liable for an apportioned part of the damages for breach of covenant to repair. It seems clear that before breach the obligation of each of them is of necessity an obligation to repair the whole estate. This in itself is not divisible and, if one of the tenants in common expended in repairs one half the sum necessary to repair the whole property, he would not thereby be in a position to say that he had fulfilled his obligation as assignee of an undivided share over the whole of the leased land, inasmuch as there is only one indivisible obligation extending over the whole

of the land. Where leased land is physically divided it is possible to say that the covenant imposed by law through privity of estate on the assignee is confined to the part of the land in respect of which there is privity of estate between the assignee and the landlord, but where the land is not physically divided, it is not possible to split the covenant into two covenants capable of enforcement. It is to be remembered that the covenant is not to pay damages if the repair is not done, but it is a covenant to do the repairs, and it seems to me on principle that the right to damages must be co-extensive with the right conferred on the landlord and the duty imposed on the tenant. A covenant which before an action is brought is necessarily a covenant to repair the whole of the property cannot by the issue of a writ become a covenant to pay half the damages for non-repair. In *Thompson* v. *Hakewill* (1) Byles J., dealing with the question from the point of view of tenants in common of the reversion, points out that they may have separate claims according to the extent of their interest for a money rent, but with reference to such services as a hawk or horse which cannot be severed they can only have one claim. In support of this he cites a passage from Littleton, s. 314, and then points out "the analogy of this to the case of a covenant with two tenants in common to repair a house, in every brick whereof they are jointly interested, and more especially to such a covenant to repair after notice." It was accordingly held in that case that where the original lease had been a joint lease by two tenants in common the assignee of one of the tenants in common could not sue alone on a covenant to repair. In *Roberts* v. *Holland* (2) it was held by Wills and Charles JJ. that if a lease be granted by one person, containing a covenant with the lessor which runs with the land, and the reversion afterwards becomes severed and vests in several tenants in common, one of the tenants in common can maintain an action to recover such damage as he has suffered under the breach of covenant to repair. *Thompson* v. *Hakewill* (1) was cited, and distinguished on the ground

(1) (1865) 19 C. B. (N. S.) 713, 728, 729. (2) [1893] 1 Q. B. 665.

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that in that case originally the lease had been a joint one. In the present case the covenant was joint and several.

Merceron v. *Dowson* (1) was cited by the defendants as an authority in their favour. It seems to me that that case can only be treated as an authority for what it in fact decided—namely, that, if the reversioner brings an action against one tenant in common for damages for breach of covenant to repair, it is not a good answer to plead that the defendant has only an undivided share in the land which is subject to the covenant. In giving judgment Bayley J. said (2): "The defendant is the assignee of the lessee; and though he has no entire interest in any part of the estate, he has a qualified interest in the whole: and as the whole estate is burthened with the liability to repair, he is liable for a portion of the repair commensurate with his interest. But he by his plea says, that he is not liable at all. That is a plea in bar, and as such, clearly bad. He should have pleaded that he was not liable for the whole in the manner in which he is charged, and should have described the other persons who are jointly liable with him, so as to enable, and consequently to compel, the plaintiff to join them in the declaration. His only ground of objection is that he is charged singly, whereas he ought to have been charged jointly with others, and that was matter which should have been pleaded in abatement, and not in bar." Holroyd J. said that the defendant ought to have pleaded in abatement and not in bar. Littledale J. said (3): "If the meaning of the defendant was to deny his liability except in respect of one sixth or one third, he should have confined his plea to the residue. I am by no means satisfied that, so far as that, he might not have pleaded in bar, because he might not know who the other tenants in common were; but as this plea is bad either in bar, or in abatement, it is not necessary to decide that point. It was decided in *Gamon* v. *Vernon* (4), that either debt or covenant will lie for rent against the assignee of part of an estate; and assuming that to be law, I see no reason

(1) 8 D. & Ry. 264.
(2) Ibid. 268.
(3) Ibid. 269.
(4) 2 Lev. 231.

why covenant should not lie against such an assignee for a portion of the damages arising from non-repair: for such damages appear to me to be as easily apportionable as rent. But, however that may be, it is clear that this plea is bad, and consequently the plaintiff is entitled to judgment on the demurrer." It seems to me clear that this decision does not necessarily involve the proposition that a tenant in common can only be sued for his proportion of the damages. Some words in the judgment of Bayley J. already quoted appear to indicate that he thought that the defendant would have had a defence if he had pleaded it in bar to half of the claim, but, if he really thought this, it is difficult to understand his reference to a plea in abatement, as a plea in abatement would only be necessary if there were other persons liable to perform the same duties as himself. Littledale J. obviously was inclined to think that the plea would have been a good one if confined to a portion of the liability, but he says it is unnecessary to decide this. I therefore do not think that *Merceron* v. *Dowson* (1) affords conclusive authority for the proposition put forward by the defendants. As I have already stated, I think the decision of Kindersley V.-C. in *Norval* v. *Pascoe* (2) involves the proposition contended for by the plaintiffs—namely, that each tenant in common is liable for the whole of the damages. It is true that that was a case relating to mining licences, but it was argued and decided on the assumption that covenants run with a licence in the same way as they do with leased land. It has been pointed out that the last words of the judgment, in which it is stated that the result is exactly consistent with justice since the defendant, though he took only two-thirds, had in fact been working the whole, shows that the decision is unsatisfactory. It seems to me that what the Vice-Chancellor meant by those words was that he was satisfied that the principle on which he decided the case did not have the unfortunate result of making the defendant pay what was in reality some one else's debt. This, however, was no part of the ratio decidendi but only an expression of satisfaction that the law did not work unjustly

(1) 8 D. & Ry. 264. (2) 34 L. J. (Ch.) 82.

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in the case before him. In my view, both on principle and on authority, my judgment should be in favour of the plaintiffs, that the plea contained in para. 9 (*b*) of the defence of the Public Trustee, and 8 (*b*) of the defence of A. J. Thomas, affords no answer to the plaintiffs' claim to recover from them or either of them the whole of the damages which the plaintiffs may prove they have sustained by reason of the alleged breach of covenant. There must be judgment for the plaintiffs on the point of law, and the defendant, the Public Trustee, must pay the costs in any event of this hearing and incidental thereto.

Judgment for plaintiffs on point of law.

Solicitor for plaintiffs: *S. L. MacAndrew.*

Solicitors for Public Trustee: *Corbin, Greener & Cook.*

J. S. H.

1922 *May* 25, 29, *Dec.* 18.

1923 *Jan.* 11.

NICHOL *v.* FEARBY.

[1921. N. 609.]

NICHOL *v.* ROBINSON.

[1921. N. 610.]

Local Government—Municipal Election—Failure of Candidate to make Return of Expenses and Declaration—Action for Penalties—Subsequent Application by Candidate for Relief—"Inadvertence"—Jurisdiction of single Judge, not on Election Rota, to entertain Application—Municipal Corporations Act, 1882 (45 *&* 46 *Vict. c.* 50), *s.* 224—*Municipal Elections* (*Corrupt and Illegal Practices*) *Act,* 1884 (47 *&* 48 *Vict. c.* 70), *s.* 21, *sub-ss.* 3, 4, 7.

Sect. 224, sub-s. 1, of the Municipal Corporations Act, 1882, provides that "an action to recover a fine from any person for acting in a corporate office without having made the requisite declaration, or without being qualified . . . . may not be brought except by a burgess of the borough, and shall not lie unless the plaintiff has, within fourteen days after the cause of action arose, served a notice in writing personally on the person liable to the fine of his intention to bring the action, nor unless the action is commenced within three months after the cause of action arose."

By s. 21, sub-s. 3, of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, every candidate at a municipal election is required within twenty-eight days after the day of the election to send to the town clerk a return of his election expenses accompanied by a declaration in the form set out in Sch. IV. to the Act, or to the like effect.

By s. 21, sub-s. 4, it is enacted that after the expiration of the time for making the return and declaration, the candidate, if elected, shall not, until he has made the return and declaration or until the allowance of an authorized excuse, sit or vote "in the council," and if he does so he shall forfeit 50*l.* for every day on which he so sits or votes to any person who sues for the same.

By s. 21, sub-s. 7, if the candidate applies "to the High Court or an Election Court" and shows that the failure to make the return and declaration has arisen (inter alia) "by reason of inadvertence . . . . and not by reason of any want of good faith" on his part, the Court may make an order excusing the failure to make the return and declaration.

The defendants were duly elected members of a town council, and thereafter each sat or voted at meetings of the council and at committee meetings of the council without having made the return and declaration required by s. 21, sub-s. 3, of the Municipal Corporations (Corrupt and Illegal Practices) Act, 1884, each being ignorant of his statutory obligation to do so. In an action by the plaintiff, suing as a common informer, to recover penalties from the defendants under s. 21, sub-s. 4, of the Act for having sat or voted without having made the return and declaration:—

Held (1.) that s. 224 of the Municipal Corporations Act, 1882, does not apply to an action for penalties under s. 21, sub-s. 4, of the Act of 1884, and (2.) that, unless relief was granted under s. 21, sub-s. 7, of the last-mentioned Act, the defendants were liable to penalties for having sat or voted at meetings of the council, but not for having sat or voted at meetings of committees of the council.

On a subsequent application by the defendants for relief,

Held (1.) that a single judge, although not on the rota of election judges, has jurisdiction to entertain an application for relief under the Act of 1884, (2.) that the fact that the application is made after the issue of the writs in the actions for penalties does not prevent the Court entertaining it, (3.) that ignorance of the statutory obligation to make the return and declaration may constitute "inadvertence" within s. 21, sub-s. 7, of the Act of 1884, and (4.) that the Court, being satisfied of the good faith of the defendants, should, in the circumstances, grant relief from the penalties incurred.

FURTHER consideration by McCardie J. of actions tried by him at Newcastle-upon-Tyne.

The facts, which are summarised in the headnote, are fully stated in the judgment.

Paley Scott for the plaintiff.

R. Frank Burnand for the defendants.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

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1922. May 29. McCARDIE J. read the following judgment:

These actions were together tried before me at the Newcastle Assizes and then adjourned to London for argument upon the novel and important points of law which arise.

The questions at issue in each action are in substance the same and I therefore give one decision upon both cases. The defendant, Fearby, is a clerk in the office of a railway company. The defendant, Robinson, is an official in the service of the Society for the Prevention of Cruelty to Animals. The plaintiff is a common informer. He claims under s. 21, sub-s. 4, of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884. As against the defendant, Fearby, he claims 550*l*. As against the defendant, Robinson, he claims 800*l*. The facts can be stated with comparative brevity. On November 1, 1920, each of the defendants stood as a candidate for election to the council of the borough of Morpeth. Each was elected on that day and was so declared by the mayor. Thereupon the duty fell on the defendants of observing the requirements of s. 21 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884. Sub-s. 3 of that section provides: "Within twenty-eight days after the day of election of a councillor every candidate at such election shall send to the town clerk a return of all expenses incurred by such candidate or his agents on account of or in respect of the conduct or management of such election, vouched (except in the case of sums under twenty shillings) by bills stating the particulars and receipts, and accompanied by a declaration by the candidate made before a justice in the form set forth in the Fourth Schedule to this Act, or to the like effect." I need not set out the form of declaration indicated by the Fourth Schedule. The next provision of s. 21 of the above Act is sub-s. 4, which says: "After the expiration of the time for making such return and declaration the candidate, if elected, shall not, until he has made the return and declaration (in this Act referred to as the return and declaration respecting election expenses), or until the date of the allowance of such authorized excuse, as is

mentioned in this Act, sit or vote in the council, and if he does so shall forfeit fifty pounds for every day on which he so sits or votes to any person who sues for the same."

I may mention here that sub-ss. 7 and 8 of s. 21 give power to the High Court or an election Court (if proof be given of certain circumstances) to grant relief in the manner and upon the terms indicated in such sub-sections. The circumstances mentioned in those sub-sections may be described as "authorised excuses." Such, as above stated, was the duty of the defendants. They did not fulfil it. I am satisfied that each was wholly ignorant of the requirements of s. 21. No one reminded them of their statutory obligation. The time for making their return and declaration expired on or about November 29, 1920. Thereafter, the defendants sat or voted at various meetings of the whole borough council. Thus, the defendant, Fearby, sat or voted on December 14, 1920, February 8, 1921, and March 8, 1921. So, too, the defendant, Robinson, sat or voted on December 14, 1920, January 8, 1921, February 8, 1921, and March 8, 1921. They also sat or voted at divers committees of the borough council and also on certain other occasions, which will call for consideration hereafter.

On or about March 8, 1921, the defendants opposed a certain housing scheme which was for the consideration of the council. Their opposition aroused the irritation of the town clerk (a Mr. Jardine), who thereupon announced for the first time that both the defendants were liable to heavy penalties. It will be my duty at a later stage to express my views upon the conduct and the methods of the town clerk. It is not relevant at the moment.

It only remains to add, for the purpose of dealing with the first main point of the case, that on or about November 23, 1920, the defendant, Fearby, apparently sent an informal document to the town clerk with respect to his expenses and that on or about February 23, 1921, the defendant, Robinson, sent a like document to the town clerk. Neither defendant, however, has made at any time the declaration required

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by s. 21, sub-s. 4, of the Act of 1884. The writ in each case was issued on March 23, 1921.

Upon the above facts it would seem that each of the defendants is liable to the plaintiff for forfeitures or fines of 50*l.* per day imposed by s. 21, sub-s. 4.

Mr. Burnand, however, in his able argument for the defendants raised a point, which would, if sound, defeat in each action the plaintiff. He contends that the right of recovering a fine under s. 21, sub-s. 4, of the Act of 1884 from a candidate who is in default is subject to and limited by the provision of s. 224 of the Municipal Corporations Act, 1882. That section provides (sub-s. 1): "An action to recover a fine from any person for acting in a corporate office without having made the requisite declaration, or without being qualified, or after ceasing to be qualified, or after becoming disqualified, may not be brought except by a burgess of the borough, and shall not lie unless the plaintiff has, within fourteen days after the cause of action arose, served a notice in writing personally on the person liable to the fine of his intention to bring the action, nor unless the action is commenced within three months after the cause of action arose."

It is common ground that the requirements of s. 224 of the Municipal Corporations Act, 1882, have not been complied with. The plaintiff's counsel, Mr. Paley Scott, contends that s. 224 has no application to the present case, but that it relates to a different subject matter.

In considering the question it is necessary to observe that the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, only incorporates the Municipal Corporations Act, 1882, to a limited extent. Thus, s. 34 of the Act of 1884 says that in this Act expressions have the same meaning as in the Municipal Corporations Act, 1882. So, too, ss. 35 and 36 of the Act of 1884 apply Part IV. of the Act of 1882 to certain municipal and other elections. Part IV., however of the Act of 1882 only covers ss. 77 to 104 of that Act, which deal with corrupt practices and election petitions. There is nothing in the Act of 1884 which expressly incorporates s. 224 of the Act of 1882. If, then, there be no express

incorporation of s. 224 into the structure of the Act of 1884, can I hold that there is an implied incorporation, or that the two Acts are to be read as one? I do not overlook the passage in Maxwell on Statutes, 6th ed., p. 64, that "not only may the later Act be construed by the light of the earlier, but it sometimes furnishes a legislative interpretation of the earlier." But the guiding and limiting rule is stated by Lord Mansfield in *Rex* v. *Loxdale* (1), when he said: "Where there are different statutes in pari materia though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.": see Maxwell, p. 62, and the notes thereto. Ere the above rule can be applied, however, the Court must be satisfied that the statutes are in fact in pari materia. In my opinion the subject matter of s. 224 is quite distinct from the subject matter of the Act of 1884. The latter relates to the conduct of elections and to corrupt practices, etc., in connection therewith, whereas the subject matter of s. 224 of the Act of 1882 is clearly found in ss. 35 and 41 of the same Act. Sect. 35 provides that "a person elected to a corporate office shall not, until he has made and subscribed before two members of the council, or the town clerk, a declaration as in the Eighth Schedule, act in the office except in administering that declaration." Sect. 41, sub-s. 1, provides that "if any person acts in a corporate office without having made the declaration by this Act required, or without being qualified at the time of making the declaration, or after ceasing to be qualified, or after becoming disqualified, he shall for each offence be liable to a fine not exceeding fifty pounds, recoverable by action." Sects. 35 and 41 are substantive sections and s. 224 is the procedure section, which upon the face of it is, I think, referable to and limited in operation to those two sections. I am unable to see any good reason for applying s. 224 of the Municipal Corporations Act, 1882, to s. 21, sub-s. 4, of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884.

My opinion on the point is strengthened by a consideration

(1) (1758) 1 Burr. 445, 447.

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of the course of legislation so concisely and clearly outlined by Mr. Paley Scott for the plaintiffs. First, there are the provisions of ss. 77 et seq. of the Municipal Corporations Act, 1882. Secondly, there are the provisions of the Corrupt and Illegal Practices Act, 1883, with respect to parliamentary elections, including s. 33 thereof, which provides for a return and declaration by a parliamentary candidate and which enacts, in substance, that the candidate shall not sit or vote in the House of Commons (after the period provided for the delivery of the return and declaration), and then says, in sub-s. 5, "if he sits or votes in contravention of this enactment he shall forfeit one hundred pounds for every day on which he so sits or votes to any person who sues for the same." Thirdly, the scheme involved in the Corrupt and Illegal Practices Act, 1883, as to parliamentary elections was applied, with the appropriate variation, to municipal elections by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884. I am of opinion that s. 21, sub-s. 4, of the Act of 1884 is unaffected by s. 224 of the Act of 1882. The view I have ventured to express is, I think, unimpaired by the decisions cited for the defendants—namely, *Attorney-General* v. *Moore* (1); *In re Elections of County Councillors* (2); and *Forbes* v. *Samuel.* (3)

It follows, therefore, that the plaintiff, as a common informer, is entitled (subject to any question of relief by the Court under s. 21, sub-s. 7, of the Act of 1884) to recover penalties against the defendants under sub-s. 4 of that section. I may point out that the Treasury apparently have no power to remit any penalties incurred by the defendants: see *Todd* v. *Robinson.* (4) To what penalties is he entitled? The point has been very well argued by counsel on both sides. It arises thus: sub-s. 4 says that the defaulter shall forfeit fifty pounds for every day on which he sits or votes "in the council." These words seem simple until attention be given to the singular intricacy of English local government law. The dates in respect of which penalties

(1) (1878) 3 Ex. D. 276.
(2) (1889) 5 Times L. R. 220.
(3) [1913] 3 K. B. 706.
(4) (1884) 12 Q. B. D. 530.

are claimed that the defendants sat or voted may be classified under four heads: (1.) the dates on which the defendants sat or voted at meetings of the municipal borough council as such, (2.) the dates on which the defendants sat or voted at committee meetings of the municipal borough council as such, (3.) the dates on which the defendants sat or voted at meetings when the borough council met to exercise functions as an urban district council under the Public Health Acts, and (4.) the dates on which the defendants sat or voted at meetings of the committees of the said council in their capacity as an urban district council under the said Public Health Acts.

I cannot undertake even to sketch in this judgment the scheme of local government in English boroughs. It will suffice to say the following: Morpeth is a very old borough corporation. It was known in the days of William the Conqueror. It was apparently created a corporation by a now lost charter. It fell, I assume, within the scope of the Municipal Corporations Act, 1835, which was a great reforming statute. It is not disputed that it falls within the scope of the Municipal Corporations Act, 1882. That Act is divided into thirteen parts, and various schedules. Each part deals with a separate fasciculus of matters. The only part I need now specify is Part II., which deals with the constitution and government of boroughs. In Part II. appears s. 10, which provides (inter alia) that the municipal corporation of a borough shall be capable of acting by the council of the borough and that the council shall exercise all powers vested in the corporation by the Act or otherwise. That section also provides that the council shall consist of the mayor, aldermen and councillors. In Part II. also appears s. 22, which provides (inter alia) that "the council may from time to time appoint out of their own body such and so many committees, either of a general or special nature, ... but the acts of every such committee shall be submitted to the council for their approval." Mr. Burnand, for the defendants, submits that a committee is one thing and that the council is another thing. There seems much force in this contention. The committee is not a corporate body. It has, speaking broadly, no independent

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powers. It is a merely subordinate entity. In *Reynell* v. *Lewis* (1) Pollock C.B. said: "The term 'committee' means an individual or a body to which others have committed or delegated a particular duty, or who have taken on themselves to perform it in the expectation of their act being confirmed by the body they profess to represent or act for"; see also Stroud's Judicial Dictionary, tit. "Committee," and the useful matters there mentioned.

Throughout the Municipal Corporations Act, 1882, a clear distinction seems to be drawn between the borough council and a committee thereof: see, for example, s. 22, sub-s. 2. I may refer also to the index to Arnold on Municipal Corporations, 5th ed., titles "Committee" and "Joint Committee"; see, too, Wright and Hobhouse on Local Government, 4th ed., and the index thereto, and *Rex.* v. *Sunderland Corporation.* (2) It is also worthy of note that s. 34 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, says that "In this Act expressions have the same meaning as in the Municipal Corporations Act, 1882." If so, the word "council" in s. 21, sub-s. 4, of the Act of 1884 should bear the meaning given to that word in s. 10 of the Act of 1882, which (as already mentioned) says that the council shall consist of the mayor, aldermen and councillors—that is, the entire corporate entity. It may well be argued, moreover, that if those who framed s. 21 of the Act of 1884 meant to provide a penalty for sitting or voting at a committee as distinguished from the council it would have been easy to say so.

I quite appreciate the contention of Mr. Paley Scott for the plaintiff, but I must remember, ere reaching a conclusion, that I am dealing with a very stringent penal provision. I must construe it with strictness. It is at this point that *Tuck* v. *Priester* (3) greatly assists the defendants. There Lord Esher said (4) upon the statute there in question: "We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation

(1) (1846) 15 M. & W. 517, 529.
(2) [1911] 2 K. B. 458.
(3) (1887) 19 Q. B. D. 629.
(4) Ibid. 638.

which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections." A still more emphatic view was expressed by Lindley L.J. (1) Whilst fully alive to the difficulties involved, I think that I ought here to apply the *Tuck* v. *Priester* (2) rule of construction. In view of the doubts I feel as to the proper construction of the word "council" in s. 21, sub-s. 4, of the Act of 1884, I shall hold that it only inflicts the penalty for sitting or voting in a meeting of the council as distinguished from a meeting of a mere committee of that body.

This leaves classes 3 and 4 to be briefly considered. The matter stands thus: The functions and powers of a borough council under the Municipal Corporations Act, 1882, as specified in that Act, do not include the broad range of powers given by the Public Health Act, 1875, and the later Public Health Acts. Upon turning to the Public Health Act, 1875, it will be seen that s. 5 provides for the creation of (*a*) urban sanitary districts, and (*b*) rural sanitary districts, and that s. 6 provides that urban districts shall consist (inter alia) of boroughs, and that the urban authority shall be the mayor, aldermen and burgesses acting by the council. The word "borough" is defined in s. 4, and s. 200 provides for the power of the urban authority to appoint committees. Time does not permit me to dwell on these points. I need only refer to Lumley's Public Health, 8th ed., vol. i., pp. 4, 37, and 464. The effect of this legislation is to bestow on a borough, unaffected by any special legislation, two capacities—namely, (*a*) capacities under the Municipal Corporations Act, 1882, and (*b*) capacities under the Public Health and cognate Acts: see Wright and Hobhouse on Local Government, 4th ed., pp. 27, 28. These functions, though they happen to be exercised by one body, are in truth fundamentally distinct. This will be seen on looking through the provisions of the several Acts. This, too, seems to be recognized by s. 198 of the Public Health Act, 1875, which provides: "Where

(1) (1887) 19 Q. B. D. 544. (2) Ibid. 629.

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an urban authority are the council of a borough, they shall, subject to the provisions of this Act, exercise and execute their powers authorities and duties under this Act according to the laws for the time being in force with respect to municipal corporations in England." The council and the urban authority seem to be one body with two personalities: see *Andrews* v. *Ryde Corporation.* (1) The general law, however, is sometimes subject to particular modification by private Act or statutory Order. I have no information before me at all as to the actual statutory position of Morpeth. I am left entirely in the dark, except that I know that totally different books of minutes were (as may be usual) kept for the council as an urban district authority as distinct from a municipal corporation. Under these circumstances, Mr. Paley Scott, for the plaintiff, stated that he would not press the claim so far as the defendants sat or voted with respect to urban district matters, whether dealt with by the council as a whole, or by a committee thereof.

Each statement of claim seems, as Mr. Paley Scott admits, to be framed on the footing only that the defendants sat or voted in the council acting in municipal corporation matters rather than with public health matters. He stated that he did not ask for an amendment of the statement of claim. I certainly would not grant an amendment in such actions as these: see *Forbes* v. *Samuel.* (2)

Apart, therefore, from any question of applying *Tuck* v. *Priester* (3) to the points arising under classes 3 and 4 and holding the plaintiff strictly to the form of his pleading, I shall not award any sum in respect of classes 3 and 4. It follows then that, unless relief can be granted to the defendants, the plaintiff is prima facie entitled to recover 150*l.* from the defendant Fearby and 200*l.* from the defendant Robinson in respect of class 1.

I regret that it should have been thought desirable to bring these actions. The defendants are respectable and responsible citizens. They sought to serve the public on the Morpeth

(1) (1874) L. R. 9 Ex. 302. (2) [1913] 3 K. B. 706, 739.
(3) 19 Q. B. D. 629.

council. They were ignorant of the technical requirements of s. 21 of the Act of 1884. The town clerk of the council knew the requirements of that section perfectly well. It was his moral, though perhaps not his legal duty, to inform the defendants of their legal obligation. Unhappily, he harboured an animosity against both defendants because they had, in pursuance of their duty as burgesses, been in opposition to him in the past. I am satisfied that he deliberately refrained from telling the defendants of their obligation in order that he might thereby secure a weapon against them and so gratify his unfortunate antagonism. I gravely deplore his conduct. His evidence at the trial was very unsatisfactory. I have no doubt that after the defendants had incurred the penalties the town clerk set himself out to find a common informer. He secured the present plaintiff, who was not called before me at the trial, and of whose antecedents nothing is known. The plaintiff is a mere puppet. I have no doubt that these actions have been brought at the instigation and with the support of the town clerk. They have been launched not in the public interest but for the purposes of revenge, and in order to effect (if possible) the financial ruin of two most reputable and worthy citizens of small means. The only redeeming features of the actions are the dignity and ability with which Mr. Paley Scott has fulfilled his duty as the plaintiff's counsel.

Holding as I do that each defendant is liable to the penalties I have stated, I yet abstain from entering judgment forthwith. I shall give the defendants a full opportunity of applying either to myself or to some other Court for such relief as their counsel may advise. I express no opinion now upon the unusual points which may arise on that application. The cases at present will stand adjourned for further mention.

1922. Dec. 18. The application by the defendants for relief now came before McCardie J.

R. Frank Burnand for the defendants.

Paley Scott for the plaintiff.

The arguments fully appear in the judgment.

Cur. adv. vult.

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1923. Jan. 11. McCARDIE J. read the following judgment which, after stating the result of his decision set out above, continued: I postponed the entry of judgment in order that the defendants might, if so advised, apply for relief under the provisions of s. 21, sub-s. 7, of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884. Those applications were made to me on December 18, 1922, when the argument was ably presented by Mr. Burnand on behalf of the defendants and by Mr. Paley Scott as counsel for the plaintiff.

The penalties had been incurred under s. 21, sub-s. 4, of the above Act. The words of s. 21, sub-s. 7, as to relief are these: "If the candidate applies to the High Court or an election Court, and shows that the failure to make the said return and declaration, or either of them, or any error or false statement therein, has arisen by reason of his illness or absence, or of the absence, death, illness, or misconduct of any agent, clerk, or officer, or by reason of inadvertence, or of any reasonable cause of a like nature, and not by reason of any want of good faith on the part of the applicant, the Court may, after such notice of the application and on production of such evidence of the grounds stated in the application, and of the good faith of the applicant, and otherwise as to the Court seems fit, make such order for allowing the authorised excuse for the failure to make such return and declaration, or for an error or false statement in such return or declaration, as to the Court seems just." Sub-s. 8 is as follows: "The order may make the allowance conditional upon compliance with such terms as to the Court seems calculated for carrying into effect the objects of this Act, and the order shall relieve the applicant from any liability or consequences under this Act in respect of the matters excused by the order."

I may say here that all the requisite formalities under s. 21 have been complied with.

Upon the opening of the application to me a preliminary point was raised by Mr. Paley Scott for the plaintiff—namely, that I had no jurisdiction to entertain the application. This point, which is one of some importance, was fully argued before me. It seems clear that I am not, when sitting here

in the ordinary course of King's Bench work, an election Court. I may refer to s. 34 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, ss. 92–93 of the Municipal Corporations Act, 1882, and s. 64 of the Corrupt and Illegal Practices Prevention Act, 1883. The plaintiff's counsel, however, further submits that the words "High Court" do not suffice to give me jurisdiction when sitting as a single judge and not being on the election rota. The phrase "High Court" is not defined by the Act of 1884 itself. But s. 34 of that Act refers (by implication) to s. 64 of the Corrupt and Illegal Practices Prevention Act, 1883 (where "High Court" is defined as "Her Majesty's High Court of Justice in England"), and to s. 7 of the Municipal Corporations Act, 1882. This last named s. 7 must now be read subject to the Statute Law Revision Act, 1898, and to the Interpretation Act, 1889: see Arnold on Municipal Corporations, 5th ed., p. 7.

By s. 13 of the Interpretation Act, 1889, "the expression 'High Court' when used with reference to England or Ireland, shall mean Her Majesty's High Court of Justice in England or Ireland, as the case may be." So far, therefore, there is nothing to deprive me of jurisdiction. The matter stands differently in applications for relief under the Corrupt and Illegal Practices Prevention Act, 1883, as to Parliamentary elections, for by s. 56 of that Act there is express provision made as to the tribunal by whom jurisdiction under that Act is to be exercised. No similar provision appears in the Municipal Elections (Corrupt and Illegal Practices) Act, 1884. I ought here to state expressly that, as already indicated, I am not on the rota of election judges. The question is somewhat complicated by the fact that s. 21, sub-s. 5, of the Act of 1884 declares that a candidate who omits to duly send in his return and declaration shall be guilty of an illegal practice. The fact that doubt exists on the point here raised before me will be seen from Rogers on Elections (Municipal), vol. iii., 18th ed., pp. 343, 344. Upon the whole, however, I have come to the conclusion that I have jurisdiction to entertain this application for relief. My reasons briefly put are these:

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(1.) I find no statutory or other provision which expressly excludes my jurisdiction; (2.) s. 39 of the Judicature Act, 1873, provides that any judge of the High Court may, subject to any rules of Court, exercise in Court or chambers all or any part of the jurisdiction by that Act vested in the High Court, and further provides that "in all such cases, any judge sitting in Court shall be deemed to constitute a Court"; (3.) s. 17 of the Appellate Jurisdiction Act, 1876, provides that "Every action and proceeding in the High Court of Justice, and all business arising out of the same, ... shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single judge, and all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order, ... shall . . . . be had and taken before the judge before whom the trial or hearing of the cause took place"; (4.) s. 30 of the Judicature Act, 1873, provides (inter alia) that "any judge of the High Court sitting for the trial of causes and issues in Middlesex or London, at any place heretofore accustomed, or to be hereafter determined by Rules of Court, shall be deemed to constitute a Court of the High Court"; and (5.) Order LIX. of the Rules of the Supreme Court (which sets out the matters to be dealt with by a Divisional Court) does not mention such a proceeding as that now before me. I may add that it seems convenient that the judge who has tried the action for penalties under s. 21, sub-s. 4, of the Act of 1884 should hear the application for relief under sub-s. 7 of that section. In the Yearly Practice for 1923, notes to Order LII., r. 1 (p. 829), it is stated that applications for relief with respect to municipal elections are, in practice, made to a Divisional Court on the usual motion days. This undoubtedly is so, and the practice is convenient. But mere convenience cannot of itself dissipate or impair the jurisdiction of a single judge. It seems to have been the view of Wills and Wright JJ. that the Court (when considering an application for relief under the Act of 1884) need not comprise an election judge: see *Ex parte Haseldine.* (1) Holding then, as I do, that I have

(1) (1895) 59 J. P. 71.

jurisdiction to act under s. 21, sub-s. 7, of the Act of 1884, I proceed to consider the applications.

The more relevant words in s. 21, sub-s. 7, are "by reason of inadvertence, or of any reasonable cause of a like nature." It is of interest to note that in another relief section of the Act of 1884 the words are "from inadvertence or from accidental miscalculation, or from some other reasonable cause of a like nature." A like variation of wording is to be noted between s. 23 and s. 34 of the Corrupt and Illegal Practices Prevention Act, 1883. I confess that I should have thought that "accidental miscalculation" was a mere illustrative instance of "inadvertence." The words for consideration here are "by reason of inadvertence, or of any reasonable cause of a like nature." Before briefly dealing with the meaning of those words I may summarise the main facts proved before me.

The defendant Fearby is a clerk in the office of a railway company. Apart from one unsuccessful candidature in 1913 he has had no experience in municipal matters. His total expenses at the election in November, 1920, for the Morpeth borough council were 4*l.* 10*s.* 9*d.* The limit was 48*l.* On November 23, 1920, he sent a rough account of his expenses to the town clerk, but he never made any formal return of them nor made the declaration required by s. 21. He was ignorant of the requirements of that section. I am satisfied that he relied on the town clerk to inform him of any technical obligation. He first heard of his legal duties when on March 8, 1921, the town clerk, at a meeting of the council, informed him that he, Fearby, had incurred heavy penalties. I am satisfied that the town clerk had deliberately abstained from informing Fearby of the legal position because he harboured an animosity against him. He wished Fearby to become liable for penalties. The writ claiming 550*l.* penalties was issued against Fearby on March 23, 1921. The purported plaintiff was one Nichol, who sued as a common informer. The defendant Fearby is a man of excellent character and I am fully satisfied of his honesty and good faith throughout.

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The defendant Robinson is a superintendent of the Northumberland and North Durham Society for the Prevention of Cruelty to Animals. In November, 1920, he was elected for the first time to the Morpeth borough council. He knew that it was his duty to keep an account of his expenses and believed that he would at some time be called upon to render that account. But he was quite ignorant of the requirements of s. 21 of the Act of 1884 as to a return and declaration. His total expenses were 3*l.* 19*s.* 6*d.* The limit allowed by law was 48*l.* He preserved the vouchers for his expenses. He undoubtedly expected that the town clerk would give him information as to the formalities required by law with respect to the election. But that official harboured an animosity against Robinson as well as against Fearby, and therefore he deliberately abstained from informing him of his duties. His object was that Robinson should become liable to heavy penalties also. Robinson learnt for the first time of his legal duties on March 8, 1921, when the town clerk, at a meeting of the town council, informed him of the penalties to which he was already liable. Mr. Robinson is a responsible man of the highest character. I am fully satisfied of his honesty and good faith throughout. I need only add that at the relevant period (November-December, 1920, to March, 1921) he was under very grave domestic anxieties. His wife was critically ill. In my view the facts are, for all material purposes, substantially similar in both cases. I shall treat them as standing on the same basis.

It is plain that the present circumstances call for an interpretation of the words "by reason of inadvertence, or of any reasonable cause of a like nature." The chief feature of each application for relief is that Fearby and Robinson were ignorant of the requirements of s. 21 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884. That they relied on the town clerk for information as to their technical duties and that he was, unhappily, hostile towards them, are but incidental aspects of the case.

The first question is whether or not ignorance of the law

may fall within the word "inadvertence." This is a legal question of ever-recurring practical importance. If the answer be "no," then I must refuse these applications, and the ground on which I do it will be serious indeed. The purposes of the law will not be served by failing to face the question plainly. In several dictionaries—e.g., the Imperial Dictionary, Dr. Worcester's Dictionary and Webster's Dictionary—the word "inadvertent" seems to be treated as substantially equivalent to the words "careless" or "negligent." In Dr. Johnson's Dictionary, I see "inadvertence" is defined as "carelessness, negligence, inattention." (1) The quotation, however, given from South by the learned Dr. Johnson shows another and different meaning. It is this: "There is a difference between them, as between inadvertency and deliberation, between surprise and set purpose." In my view the word "inadvertent" may be used according to our jus et norma loquendi as indicating either a negligent act, as distinguished from a careful act, or as indicating an unintentional, as distinguished from an intentional act. So, too, of an omission, as well as of an act. The various dictionary meanings are not wholly consistent. I have consulted many of the well-known lexicons.

Bearing the above in mind, I turn to the decisions in the *Walsall Case.* (2) Both Pollock B. and Hawkins J. seem to have taken the view that ignorance of the law was not "inadvertence." Hawkins J. said (3): "Anyone who reads the Act of Parliament must know that the use of such cards is an infringement of the Act, and although a man may not know the law because he has not taken the trouble to make himself acquainted with it, no one can call that 'inadvertence' within the meaning of s. 23"—i.e., s. 23 of the Corrupt and Illegal Practices Prevention Act, 1883. If this dictum be correct it would seem to follow that neither ignorance of the law nor carelessness can amount to inadvertence.

(1) ["Want of advertence, failure to observe or pay attention; inattention": Oxford English Dictionary, *s.v.*—F. P.]

(2) (1892) 4 O'M. & H. 123; Day's Election Cases, 106.

(3) 4 O'M. & H. 129.

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So, too, in the same case, Pollock B. said (1): "If it were once allowed that a breach of the law, in the sense that there was a misconception of the law, is to be treated as an inadvertence, I do not know where there is to be any limit."

In the *West Bromwich Case* (2) Bucknill J. said: "I am not going to attempt a definition of 'inadvertence,' but it certainly does not include ignorance of the law." Ridley J. in the same case used less definite diction. He appeared to think that in some cases ignorance of the law may be inadvertence, in other cases not; and he added (3): "Inadvertence does not cover a case where in the immediate duty which he is performing he ought to have a full knowledge of the law." If this dictum be correct it follows that ignorance of the law may be inadvertence, but that whether it in fact be so or not depends on the circumstances. It is difficult to extract a principle from the decisions already cited, unless it is to be found in the above dictum of Ridley J.

In my own view it is clear that ignorance of the law may fall within the word "inadvertence." In the *Stepney Borough Case* (4) Cave J. said: "Now, as to the inadvertence, it may either be that the party was not aware of what was done, or that he did not know that it was wrong." In this judgment Vaughan Williams J. concurred: see also the fuller report of the judgment of Cave J. in Day's Election Cases, pp. 120–121; and see per Bruce J. in the *Southampton Case.* (5) In *Ex parte Walker* (6) the Court of Appeal held, and in my view unmistakably held, that ignorance of the law may be "inadvertence." Any dicta to the contrary effect in earlier cases must, I think, be deemed overruled. It will be seen that *Ex parte Robson* (7) was not cited to the Court of Appeal in *Ex parte Walker.* (6) It is a useful decision. There the successful candidate for a town council failed to send in the return and declaration required by s. 21 of the Municipal

(1) 4 O'M. & H. 128.
(2) (1911) 6 O'M. & H. 256, 289.
(3) Ibid. 287.
(4) (1892) 4 O'M. & H. 178, 182; Day's Election Cases, 120, 121.
(5) (1895) 5 O'M. & H. 17.
(6) (1889) 22 Q. B. D. 384.
(7) (1886) 18 Q. B. D. 336.

Elections (Corrupt and Illegal Practices) Act, 1884. He had incurred no expense and therefore believed that no return was required under s. 21. This was ignorance of the law. The omission was intentional because of that ignorance. The Court (Huddleston B. and Manisty J.) granted relief. This decision was followed by Lawrance and Ridley JJ. in *Ex parte Pennington.* (1) I do not propose to analyse the other decisions which are cited in Rogers on Elections, vol. iii., 18th ed., pp. 340 et seq., or in the excellent work by Sir Hugh Fraser on the Law of Parliamentary Elections, 3rd ed., pp. 194 et seq. The view I have expressed is, I believe, in full accord with the recent judgment of Sankey J. in *Ex parte Caine.* (2)

I should like to add that the word "inadvertence" in different Acts of Parliament should, if possible, be construed in the same way. Hence I may point out that ignorance of the provisions of s. 25 of the Companies Act, 1867, was held to be "inadvertence": see *In re Jackson & Co.* (3), and compare the Companies (Consolidation) Act, 1908, s. 96, and the notes thereon in Buckley on Companies, 9th ed. If, then, ignorance of the law may be "inadvertence," it follows that I need not consider the other words in s. 21, sub-s. 7—namely, "or of any reasonable cause of a like nature." Those words may call for consideration in future cases. So far, they have not been, I think, discussed in the decisions. They ought not to be overlooked.

Before proceeding further with the merits of the applications, I desire to mention briefly two points that were raised before me by Mr. Paley Scott: First, that the applications for relief are made after writs issued and therefore after causes of action have become crystallised in the plaintiff's favour: see the authorities referred to by Scrutton J. in *Forbes* v. *Samuel* (4); there, however, the statute in question gave no power of relief to the Court. In the cases now before me the power to relieve is contained in the very section which imposes the penalty. I am clearly of opinion that the power of the

(1) (1898) 46 W. R. 415.
(2) (1922) 39 Times L. R. 100.
(3) [1899] 1 Ch. 348.
(4) [1913] 3 K. B. 706, 734 et seq.

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Court cannot be defeated by the issue of a writ. The commencement of an action is merely a factor for the Court to consider when dealing with the question of relief. In *In re Pembroke County Council Election and Ramsgate Council Election* (1) the fact that an action had been begun does not seem to have been regarded by Denman and Manisty JJ. as an obstacle to the consideration of the question of relief. The point, however, was not expressly raised. In *Ex parte Oake* (2) the Court (Bigham and Darling JJ.) granted relief, although an action had been commenced for penalties. Secondly, that there has been delay in the applications. I agree that delay is a factor for consideration. But I am not aware of any case which decides that mere delay should debar the Court from entertaining the application. The effect of delay will depend on the circumstances. Prima facie, the application should be made within a reasonable time after discovery of the irregularity or default. But the Court should always exercise a just discretion and one that meets the object of the power of relief. In the matters now before me the circumstances are exceptional. The applicants only became aware of their default a very short time before the writs were issued. Acting upon legal advice they took the view that the actions should be determined ere application for relief was made. Upon the present exceptional facts I cannot attribute any substantial blameable delay to either of the two defendants.

Now ought I here to yield to the applications of the defendants for relief? The question causes me anxious consideration. Although relief was in fact granted by the Court of Appeal in *Ex parte Walker* (3), yet Lord Esher said (4): that "people who are seeking to be chosen to an office created by the Act ought to take some pains to understand its provisions." So, too, Fry L.J. said (5): "I cannot help observing upon the recklessness with which people seek to be appointed to offices without previously taking any trouble to inform themselves of the nature of the duties and

(1) (1889) 5 Times L. R. 272.
(2) (1904) Times Newspaper, Aug. 10, 1904.
(3) 22 Q. B. D. 384.
(4) Ibid. 388.
(5) Ibid. 390.

liabilities which are attached to those offices. On the occasion of any future election it may be that quite another measure of justice will be meted out to persons who commit similar breaches of the provisions of the Act." These are cogent observations, and I venture to think that they should be widely known. But I cannot, however, forget the fact that the code which governs both Parliamentary elections and municipal elections is very rigorous, very detailed and intricate. The majority of those who are candidates are laymen and not lawyers, and it is easy for an ordinary layman to overlook or misappreciate the innumerable technical requirements which surround municipal as well as Parliamentary elections. Hence the frequent grant of relief by the Courts. Ignorance of the law may, as I have held, be "inadvertence." It does not follow, however, that relief should be granted for acts or omissions due to ignorance of the law. Inadvertence may be light and excusable. On the other hand, it may be grave and seriously culpable. Good faith may not of itself be enough to negative the burden of liability for default. The nature, quality, extent and consequences of the inadvertence must be weighed by the Court in each case. It is to be noted in the present case that the question is one of serious pecuniary penalties. The Act of 1884 gives a wide discretion to the Court. On the one hand the Court must recognize the requirements of the law. Discretion must be carefully exercised. On the other hand it does not seem just that an undue burden should be imposed for a mere error of law, even though that error be blameworthy. Service in the work of local government should not be associated with a greater terror than is needed to maintain the purity of elections. If I were to refuse any relief here it may be that both defendants would be thrust into ignominious bankruptcy under the accumulated burden of penalties and costs. Ought I to inflict that punishment upon respectable citizens because of their ignorance of legal formalities? Upon the whole, though not without doubt, I have come to the conclusion that I should grant relief in the present applications. The history of the cases presents unusual features, which further support, I

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think, the exercise of my discretion in favour of the two defendants.

Upon what terms should I grant relief? If the matter stood without the disturbance of another point which has arisen at the last moment I should direct that relief should only be granted on the terms that the defendants should consent to judgment for the plaintiff's taxed costs: see *Ex parte Oake* (1), and a further sum of 10*l.* each. The plaintiff could not have complained of this, for he or his advisers knew when the actions were started that the Court might exercise its discretion as to relief. The defendants could probably meet that burden. But this most unusual case has produced yet another extraordinary point and one which I believe is without recent, if any, precedent. The plaintiff has written a letter to me (which I read in Court at the last hearing) in which he states that he was induced, whilst under the influence of drink, to lend his name as plaintiff in these actions, and he further states that he desires to withdraw his claims. He has also filed an affidavit in which he says: "I wish this Honourable Court to approve of my desire to withdraw the actions against the defendants." I have been informed by Mr. Paley Scott that he is now fully satisfied of the plaintiff's bona fide wish to withdraw. The plaintiff has not, I gather, discussed with the defendants any terms for withdrawal as to costs or otherwise. It may or may not be that plaintiff's letters to the defendants' solicitors amount to a technical compliance with Order XXVI., r. 1. Apparently the plaintiff does not expressly submit to a judgment in favour of the defendants. Under these circumstances I should, if the actions were ordinary in character, simply enter judgment for the defendants without costs as the best way of disposing of the matter so far as the actions are in question. It is difficult to get any information as to the status or movements of the plaintiff. The only clear fact seems to be that he is an existing person. But the actions are not normal but penal, and they are governed by special law based on public policy. The relevant statutes, rules

(1) Times Newspaper, Aug. 10, 1904.

and decisions are but little known. It is desirable in the public interest that I should briefly refer to them.

By 18 Eliz. c. 5, ss. 4 and 5, it would be a criminal offence for the plaintiff to compound a penal action without the consent of the Court. Several old decisions with respect to the question as to whether and in what manner the Court shall consent are set out in Chitty's Statutes, vol. ix., pp. 747, 748, under the title, "Penal Actions." I need not discuss the meaning of the word "compound." It is a broad word and may cover many things. Order L., r. 14, of the Rules of the Supreme Court provides that the order to compound a penal action shall expressly state that the defendant undertakes to pay the sum for which the Court has given him leave to compound the action. Apparently an offence against 18 Eliz. c. 5 can be committed, even though proceedings for a penalty have not been commenced. See the lucid statement in Halsbury's Laws of England, vol. ix., para. 1004. It is apparently correct that these actions cannot be ended without the consent of the Court. Moreover, as I pointed out in my earlier judgment, the penalties here in question cannot be remitted by the Crown: see the reasoning in *Todd* v. *Robinson.* (1) Under the extraordinary circumstances before me what ought I to do as to the actions and the terms of relief? Upon the whole, I do not feel called upon to enter judgment in the plaintiff's favour when he expressly states that he desires to withdraw. I ought not, however, to enter judgment in favour of the defendants with costs. I think it best formally to enter judgment for the defendant in each case without costs. This will meet, I assume, the plaintiff's desire to abandon the status of a common informer, and will give the defendants a fortunate remission of the burdens to which they might have been exposed.

I grant the applications of the defendants for relief under s. 21, sub-s. 7, of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, upon the terms that they make their respective returns and declarations within ten days. It

(1) 12 Q. B. D. 530.

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may not unjustly be said that the defendants are already sufficiently punished for their inadvertence by the anxieties of this litigation, by the peril of financial ruin to which they have been so long exposed, and by the heavy burden of costs which has fallen upon them in their defence of the actions and by their applications for relief.

Relief granted.

Solicitors for plaintiff: *Thomas Gee & Co., Newcastle-upon-Tyne.*

Solicitors for defendants: *Torr & Co., for T. & R. Nicholson, Morpeth.*

J. S. H.

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[IN THE COURT OF APPEAL.]

HOLT *v.* MARKHAM.

Money had and received—Payment under Mistake of Fact—Alteration of Position by Payee—Estoppel.

By certain military regulations officers in the Royal Air Force were on demobilization entitled to a gratuity varying in amount according to circumstances. If their names were on a certain list, called the Emergency List, they were only entitled to a gratuity at a lower rate than if they were not on that list. The defendant was a demobilized officer of the Royal Air Force. The plaintiffs, who acted as Government's agents for the payment (inter alia) of gratuities to demobilized officers of that force, in ignorance of the fact that the defendant was on the Emergency List, but also in forgetfulness of the regulation which provided that the gratuities of officers on the Emergency List should be paid at the lower rate, and not appreciating the materiality of an officer being on that list, paid the defendant his gratuity at the higher rate to which he would have been entitled if he had not been on that list. More than a year afterwards, and before notice of the mistake, the defendant spent the money. In an action to recover back the excess payment as money paid under a mistake of fact:—

Held, that the plaintiffs could not recover on the grounds—

1. That the plaintiffs' mistake was not a mistake of fact causing the payment; and

2. That as the defendant had been led by the plaintiffs' conduct to believe that he might treat the money as his own, and in that belief had altered his position by spending it, the plaintiffs were estopped from alleging that it was paid under a mistake.

APPEAL from a judgment of Lush J. at the trial.

The plaintiffs were army agents and bankers, and in February, 1918, were appointed by the Air Council as their agents for the issue of pay and allowances to officers of the Air Force.

The defendant, Colonel R. G. L. Markham, had at one time been in the Royal Navy, having entered it in 1892, and he was serving in it as an engineer-lieutenant in 1900 when he resigned his commission. He was not put on the retired list; he received neither a pension nor gratuity; he left the service altogether. In 1913, there being a scare of war, he offered his services to the Royal Naval Air Service, which were accepted. He was placed on the "Emergency List," but received no pay or emoluments until after war had broken out. In August, 1914, he was given a "temporary commission" in the Royal Navy, being attached to the Air Service, with the rank of engineer-lieutenant. During the time that he was so serving he received the bonus of 25 per cent. on his pay to which officers on the Emergency List and holding temporary commissions were entitled in accordance with the regulations in that behalf. In 1918 the Royal Naval Air Service was amalgamated with the Royal Flying Corps and became the Royal Air Force. The defendant was then given a temporary commission in the Royal Air Force, but thenceforward he received no bonus on his pay. He was subsequently promoted, and became Commanding Officer at Yate. In August, 1919, he was demobilized, and on August 25, 1919, he made an application for a gratuity, on the form applicable to an officer holding a temporary commission in the Air Force, as for a period of five years, from August 17, 1914, to August 3, 1919.

By an Admiralty Order of 1919 an officer in the Royal Naval Air Service was entitled to thirty-one days' pay for every year's service or part of a year's service. By art. 497 of the Royal Warrant of 1914 officers employed temporarily in the Army were entitled to a gratuity on the cessation of their employment: *a.* "In the case of an officer who retired with retired pay or gratuity 31 days' pay for every year of

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service or any part of a year." *b.* "In the case of any other officer 124 days' pay for the first year of service or any part of a year and 62 days' pay for each subsequent year of service or part of a year." By an Order made under the Air Force (Constitution) Act, 1917, the provisions of art. 497 above mentioned were applied to temporary officers of the Royal Navy transferred to the Air Force. By an Order of the Air Ministry dated February 2, 1919, and numbered 263, relating to war gratuities payable to officers transferred or attached to the Air Force it was stated that "Gratuities on the following scales have been approved" for "All officers on the Retired or Emergency Lists, Royal Navy and Royal Marines, employed during the war:—For every year's service or part of a year's service . . . . 31 days' pay." The rate of the defendant's pay was 40*s.* per day, and the plaintiffs, treating his case as coming within art. 497, *b*, of the Royal Warrant paid him on September 18, 1919, the sum of 744*l.*, being 124 days' pay for the first year's service, and sixty-two days' pay for each of the four remaining years. Two-thirds of the said sum—namely, 496*l.*—they paid to him in cash, and one-third—namely, 248*l.*—in War Savings Certificates. On February 2, 1921, the plaintiffs wrote to the defendant that they had received a communication from the Air Ministry to the effect that the charge in their account of 744*l.* for gratuity to the defendant was wrong, that as a retired R.N. officer he was only entitled to a gratuity under art. 497, *a*, of the Royal Warrant, and that the difference of 434*l.* was disallowed. The plaintiffs said that they had looked into the matter and found that the Air Ministry were correct. "As a retired officer on retired pay you were only entitled to a gratuity under art. 497, *a*, 310*l.*," and they demanded the return of the over payment of 434*l.* In reply on February 7 the defendant pointed out that they had made a mistake, and that he was "not a retired officer on retired pay." The plaintiffs inquired of the Admiralty whether that statement was correct, and were informed by a letter dated February 17, 1921, that the defendant "resigned his commission as Engineer, R.N., on May 15, 1900. He was

appointed Engineer on the Emergency List on February 4, 1913." Thereupon the plaintiffs, attaching no importance to the statement that the defendant had been put on the Emergency List and overlooking the provisions of Order 263, wrote to the Air Ministry on February 21, 1921, insisting that their payment of 744*l.* was in order. On March 21 the Air Ministry wrote to the plaintiffs "as the above-named officer received a bonus of 25% of his pay whilst in the R.N.A.S. in lieu of counting the time served towards pension, gratuity is admissible under art. 497, *a*, of the Royal Warrant only." The plaintiffs replied that they ought to have been informed of the fact that the defendant had been at one time in receipt of a bonus if that fact was material, and under the circumstances they protested against the disallowance. In answer the Air Ministry pointed out that it was clearly laid down in Order 263 of 1919 that officers on the Emergency List of the Royal Navy were only entitled to gratuity at the rate of thirty-one days' pay for each year's service, and insisted that the disallowance must stand. This was the first time that Order 263 had been referred to in the correspondence, and the defendant stated in evidence that he had at that time never seen the Order, and knew nothing of its provisions. The plaintiffs then wrote to the defendant on April 18 demanding repayment of the 434*l.* disallowed. In the meantime the defendant, who had heard nothing from the plaintiffs since his letter of February 7, in which he had pointed out that the disallowance was founded upon a mistake, assumed that the matter was concluded, and sold his War Savings Certificates and invested a substantial sum in a company which has since gone into liquidation. The defendant being unable to refund the amount of the disallowance this action was brought to recover that sum as money paid under a mistake of fact. After action brought it was pointed out in a letter dated May 15, 1922, from the Admiralty to the Air Ministry that had the defendant been treated as being on the Emergency List after his transfer to the Air Force he would have received a bonus during the whole period, whereas he was in fact treated as a "temporary

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officer" without bonus; and the Air Ministry having regard to that fact agreed to allow the defendant a gratuity for the period since April 1, 1918, at the rate for temporary officers provided by art. 497, *b*. The disallowance was thereupon reduced from 434*l*. to 298*l*., and the plaintiffs reduced their claim accordingly. The action was tried before Lush J. without a jury. His Lordship held that the plaintiffs could not recover. He was of opinion that they had failed to satisfy the onus which lay on them of proving that, when paying the money, they had made any mistake of fact. What mistake they made was as to the effect of the various Orders relating to gratuities, and was analogous to a mistake of law. And further, even if they had made a mistake of fact, they could not recover, because they had failed to show that it was against conscience for the defendant to retain the money. The plaintiffs were in just as good a position as the defendant to appreciate the meaning of the various Orders, and he had a right to rely on their assurance that he was entitled to the money that they paid him; and as he had on the faith of that assurance altered his position by spending the money, they were precluded from maintaining the action on the principle of *Skyring* v. *Greenwood*. (1)

The plaintiffs appealed.

Holman Gregory K.C. and *Tindal Davies* for the appellants. It is clear that as the defendant was on the Emergency List of the Royal Navy he was entitled under Order 263 of 1919 to 31 days' pay for each year of service and no more, and if the plaintiffs when paying the gratuity had had present to their minds the fact that he was on the Emergency List they would not have paid it. The plaintiffs no doubt had in their possession a document showing that the defendant was on that list, but that does not preclude them from saying that they paid the money in ignorance of that fact. If they forgot the existence of the document and omitted to consult it that is equivalent to a mistake of fact, and the money can be recovered back: *Kelly* v. *Solari*. (2)

(1) (1825) 4 B. & C. 281. (2) (1841) 9 M. & W. 54.

Secondly, the judge below was wrong in holding that it was not unconscientious for the defendant to keep the money. For he knew he was on the Emergency List, and must be treated as having been aware of the provisions of Order 263. He says he never saw the Order. But he was Commanding Officer, and as such had the Orders issued to him. Those Orders were numbered consecutively, and if he missed one it was his duty to get it and see what it said. *Skyring* v. *Greenwood* (1) is distinguishable. There the paymaster of a military corps credited the account of an officer for a period of four years with certain increased pay erroneously supposed to be granted under a general order to an officer of his position. Before paying any of it the paymaster had received notice that the order did not apply to persons in the position of the officer in question, but omitted to communicate that information to him. It was held that the paymaster could not debit the account with the money so wrongly paid. But there both Abbott C.J. and Bayley J. went on the ground that the paymaster was guilty of a breach of duty in not communicating to the officer the notice that he had received. Here there was no corresponding duty in the plaintiffs. They were not the defendant's bankers.

Douglas Young (*Sir Malcolm Macnaghten K.C.* with him) for the respondent. It may be that the clerk in the plaintiffs' office who made out the order for the payment of the defendant's gratuity did not look at the Emergency List. But it was not his ignorance of the defendant being on that list that caused him to pay the money. After they received the letter of February 17, 1921, from the Admiralty they must have had present to their mind that he was on the Emergency List, for they were expressly so informed, and yet they still contended with the Air Ministry that the defendant came within art. 497, *b*. That shows that they really misconstrued the Orders. The mistake was not one of fact, but of law. There was nothing against conscience in the defendant retaining the money, for he knew nothing about Order 263. He did not in any way contribute to bring about the mistake.

(1) 4 B. & C. 289.

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The plaintiffs having induced a belief in his mind that he might treat the money as correctly paid are estopped from alleging that it was paid under a mistake, for the defendant acting upon that belief parted with the money. The case is covered by *Skyring* v. *Greenwood.* (1) There Abbott C.J. said: "It is of great importance to any man, and certainly not less to military men than others, that they should not be led to suppose that their annual income is greater than it really is. Every prudent man accommodates his mode of living to what he supposes to be his income; it therefore works a great prejudice to any man, if after having had credit given him in account for certain sums, and having been allowed to draw on his agent on the faith that those sums belonged to him, he may be called upon to pay them back." And *Deutsche Bank* v. *Beriro* (2) is to the same effect.

Holman Gregory K.C. in reply.

BANKES L.J. [Having stated the facts and referred to the correspondence above set out, his Lordship came to the conclusion that the plaintiffs in paying the money to the defendant did not act under any mistake of fact at all. Even if the clerk in the plaintiffs' office who drew up the order for the payment of the gratuity did not know that the defendant was on the Emergency List, that was not a mistake which caused the payment to be made, for it appeared clear from the correspondence that the plaintiffs did not until long after that payment appreciate the materiality of an officer being on that list. The provisions of Order 263 of 1919 appeared to have been altogether overlooked. The plaintiffs' mistake, if any, was one of law; it resulted from a failure to apply what was now said to be the true construction of the Orders relating to gratuities to the defendant's case. The plaintiffs consequently could not recover.]

His Lordship added: But it was also contended on behalf of the plaintiffs that it was inequitable for the defendant to retain the money. It was said that he knew all about his position, and that he received the money knowing that it was

(1) 4 B. & C. 289. (2) (1895) 1 Com. Cas. 123, 255.

largely in excess of what he was entitled to. All I can say is, if he did know it he knew more than Messrs. Holt knew, or than the Admiralty or the Air Ministry knew. Indeed I am not certain myself that, if I had to apply these Orders and fix the defendant's gratuity, I could even now say with certainty what was the exact amount that he was entitled to, having regard to the fact that after his appointment to the Air Force the authorities did not pay him the 25 per cent. bonus on his pay and consequently did not in fact treat him as being on the Emergency List. I am satisfied that the defendant knew no more what his position was than any of the other persons concerned in the case. He was misled by the conduct of the plaintiffs into the belief that he might retain the money. I need not go into the authorities, but the judgment of Bayley J. in *Skyring* v. *Greenwood* (1), to which we have been referred, is, I think, directly applicable to the present defendant's case, for it appears that for a considerable time he was left under the impression that, although there had been at one time a doubt about his title to the money, that doubt had been removed, and in consequence he parted with his War Savings Certificates. Having done that it seems to me that he altered his position for the worse, and consequently the plaintiffs are estopped from alleging that the payment was made under a mistake of fact. In my opinion the appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. This action was brought to recover a sum of money alleged to have been paid to the defendant under a mistake of fact. The onus of proving that there was such a mistake lies upon the plaintiffs, and further their claim may be defeated if the defendant can show that through their conduct he was led to put himself into such a position that it would be inequitable now to require him to repay the money. The first question then is: Have the plaintiffs established that this money was paid under a mistake of fact? In my opinion they have not. It seems to me that when the position of this officer and the various and conflicting Orders, which might or might not be applicable to

(1) 4 B. & C. 281.

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his case, are considered the mistake (if there was any mistake at all, as to which I am not satisfied) was not a mistake of fact, but arose from a misapplication or misconstruction of the Orders having regard to the special circumstances of the case. That the defendant's case was a special one appears from a letter from the Admiralty to the Air Ministry, dated May 15, 1922, in which they say that he should be treated as being upon the Emergency List for part of his service and as an officer holding a temporary commission for the rest of his service, and upon the receipt of which letter the Air Ministry agreed to reduce the amount of the disallowance. How in the face of that admission that the fact of the defendant having been on the Emergency List was left out of consideration it can be said that his having been on the list gave rise to a mistake of fact inducing the payment of the gratuity I cannot understand. It seems to me that on the facts of this case there was no mistake of fact at all. It was a mistake—if there was one—arising from the doubt whether in the particular circumstances of the case the officer was to be treated as entitled under art. 497, *a*, or 497, *b*, of the Royal Warrant, or Order 263 of 1919. But assume that the payment was made under a mistake of fact. The question then arises whether the conduct of the plaintiffs was such as to render it inequitable to give effect to the relief which they claim. In my opinion it was. In a letter of February 2, 1921, the plaintiffs demanded the repayment of the difference between the 744*l.* paid to the defendant and the 310*l.* to which he was entitled, basing their claim on the fact that he was a retired officer on retired pay and came within art. 497, *a*. On February 7 he replied that that claim was mistaken as he was not a retired officer. From that date until April 18 he heard no more about the matter, and from that fact he was in my opinion entitled to conclude that his reply was regarded as satisfactory, and that he was at liberty to deal with the money as he pleased. The result was that he availed himself of that liberty and spent the whole or a large part of the gratuity which had been paid him, and he is not now in a position to repay it. The plaintiffs are in my opinion estopped from

asking that he should do so. On these grounds, first, that the plaintiffs have failed to establish that the money was paid under a mistake of fact, and secondly that, if it was, they are estopped from setting it up, I think that the appeal ought to be dismissed.

SCRUTTON L.J. This is a troublesome instance of a particularly troublesome class of action. It is an action for money had and received to the plaintiffs' use, and is based upon the ground that the payment was made under a mistake of fact. Now ever since the time when that great judge, Lord Mansfield, with no doubt a praiseworthy desire to free the Court from the fetters of legal rules and enable them to do what they thought to be right in each case, obscured, in my respectful view, the nature of the action for money had and received, by saying in *Sadler* v. *Evans* (1): "It is a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money. The defence is any equity that will rebut the action," the whole history of this particular form of action has been what I may call a history of well-meaning sloppiness of thought. I do not propose to repeat the very pungent criticisms which Lord Sumner has made upon that now discarded doctrine of Lord Mansfield in *Baylis* v. *Bishop of London* (2) or in *Sinclair* v. *Brougham* (3), but I respectfully entirely agree with what he says in the former case (4): "To ask what course would be ex æquo et bono to both sides never was a very precise guide, and as a working rule it has long since been buried in *Standish* v. *Ross* (5) and *Kelly* v. *Solari*. (6) Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man'"; and with the similar passage in *Sinclair* v. *Brougham* (7): "There is now no ground left for suggesting

(1) (1766) 4 Burr. 1984, 1986.
(2) [1913] 1 Ch. 127.
(3) [1914] A. C. 398.
(4) [1913] 1 Ch. 140.
(5) (1849) 3 Ex. 527.
(6) 9 M. & W. 54.
(7) [1914] A. C. 456.

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as a recognizable 'equity' the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer." I also agree with Lord Sumner's view that it is very hard to reduce to one common formula the conditions under which the law will imply a promise to repay money received to the plaintiff's use. I do not think the time has come in this case to do it. There is something to be said for the view that payment under a mistake of fact is not payment at all, and is therefore capable of rectification in cases in which the defendant receives the money under a mistake of fact or has done something to contribute to the plaintiff's mistake of fact, but that the position is otherwise where the defendant is under no mistake of fact and has done nothing to contribute to the plaintiff's mistake, and does not appreciate that the payer is making the payment under a mistake of fact. However, the time has not yet come to attempt to settle conclusively what is the one formula which will embrace all the cases in which the common law would have allowed an action for money had and received in consequence of a payment under a mistake of fact.

I personally propose to decide this case on one main ground, although I have also a view that it would be sufficient to decide it on another. I think this is a simple case of estoppel. The plaintiffs represented to the defendant that he was entitled to a certain sum of money and paid it, and after a lapse of time sufficient to enable any mistake to be rectified he acted upon that representation and spent the money. That is a case to which the ordinary rule of estoppel applies. In *Skyring* v. *Greenwood* (1), where the facts were very similar, Bayley J. said: "It would have been a good defence to that action to say that the defendants had voluntarily advanced money to the deceased when he asked no credit, and that they had told him that they had received the money for his use, and that on the faith of their representation he had drawn it out of their hands as his own money, and had been induced to spend it as such." That view was acted upon by the Court of Appeal in the later case of *Deutsche Bank* v.

(1) 4 B. & C. 281, 290.

Beriro. (1) There also money was paid by the plaintiffs under a mistake of fact, and the person to whom it was paid acted upon that payment and paid it over to another. It was held that the plaintiffs were estopped from recovering it back. In the present case the payment was made in September, 1919, and it was not till February, 1921, that there was any suggestion of a mistake having been made, and even then the suggestion was based on an entirely wrong ground. That was corrected by the defendant, and the matter was allowed to go on for another three months before the claim was made on the lines now put forward. That appears to me amply sufficient to bring the case within the principle that I have stated.

But I desire further to say that I am not at all satisfied that there was in this case any mistake of fact in the sense in which that term is used in the cases, such for instance as *Kelly* v. *Solari* (2), where Parke B. thus expresses the principle: "I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back." It is said here that the specific fact which was supposed to be true, the knowledge of the untruth of which would have prevented the plaintiffs from paying the money, was that the defendant was not on the Emergency List. But if they had known that he was on that list that would in my opinion have made no difference, for I am satisfied that at that time no one appreciated what the effect was of an officer being on that list. An officer on the Emergency List was a very rare person. We have been furnished with a very long list, containing hundreds of names, of officers transferred from the Navy to the Air Force. I have looked through the whole of the names, under the letters E to M inclusive, and the only name I can find indicated as being on the Emergency List is that of the defendant. If therefore those letters fairly represent the

(1) 1 Com. Cas. 255. (2) 9 M. & W. 54, 58.

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rest of the alphabet the defendant's case was a most exceptional one. I come therefore to the conclusion that the mistake of the plaintiffs, which was partly one of fact and partly of construction, was in no respect connected with the payment of the money. For these reasons I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants : *Ellis Peirs & Co.*
Solicitor for the respondent : *J. B. De Fonblanque.*

J. F. C.

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HARRODS, LIMITED *v.* STANTON.

WINSTON, CLAIMANT.

Bill of Sale—Validity—"True owner" of Goods—Donee under Deed of Gift—Deed of Gift void as against Creditors—Purchaser for Value without Notice— 13 *Eliz. c.* 5, *ss.* 1, 5—*Bills of Sale Act* (1878) *Amendment Act,* 1882 (45 *&* 46 *Vict. c.* 43), *s.* 5.

A man who was in debt executed a deed of gift of his furniture in favour of his wife, who thereafter granted a bill of sale upon the furniture to a person who took for value and without notice. Subsequently the deed of gift was declared void under 13 Eliz. c. 5 as being in fraud of creditors. The furniture having been taken in execution by a judgment creditor the bill of sale holder claimed the furniture under the bill of sale. Interpleader proceedings were instituted in which the execution creditor alleged that the bill of sale was void under s. 5 of the Bills of Sale (1878) Amendment Act, 1882, on the ground that the grantor was not the "true owner" of the furniture at the time of the execution of the bill of sale :—

Held, that until the deed of gift was set aside the donee thereunder was the "true owner" of the furniture, and that as she had conveyed the furniture to a purchaser for value without notice before the deed of gift was set aside the claimant obtained a good title under the bill of sale.

Morewood v. *South Yorkshire Ry. Co.* (1858) 3 H. & N. 798 applied.

APPEAL from the decision of a Master upon the trial of an interpleader issue.

The defendant, Oscar Stanton, in October, 1920, contracted a debt with the plaintiffs, Harrods, Ld., and in December, 1921, he still owed 51*l.*

On December 5, 1921, the defendant made a deed of gift to his wife of his chattels and household effects.

On January 3, 1922, the plaintiffs issued the writ in the present action against the defendant, and on July 15, 1922, they signed judgment against the defendant for 51*l.* 6*s.* 5*d.* and costs.

On August 4, 1922, Mrs. Stanton, the wife of the defendant, granted a bill of sale of the furniture contained in the deed of gift and other articles to H. Winston, the claimant, in consideration of 150*l.* paid by him.

On August 15, 1922, the plaintiffs levied execution under their judgment, whereupon Mrs. Stanton claimed the furniture under the deed of gift.

On October 20, 1922, Master Jelf held, on the trial of an issue, that the deed of gift of December 5, 1921, was void under 13 Eliz. c. 5 (1), on the ground that it was made in order to defeat, hinder or defraud the plaintiffs, the creditors of the said Oscar Stanton.

The claimant, Winston, also claimed under the bill of sale the furniture and effects which had been seized by the sheriff, and an interpleader issue was ordered to be tried.

On November 20, 1922, Master Jelf found that the claimant was protected by s. 5 of 13 Eliz. c. 5 as being a bona fide purchaser for value without notice of the fraud, and that

(1) 13 Eliz. c. 5, s. 1, revised edition (commonly printed as s. 2), in effect provides that every gift of goods and chattels devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, etc., shall be from thenceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, whose actions, suits, debts, etc., are disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate and of none effect.

Sect. 5, revised edition (commonly printed as s. 6), "this Act or anything therein contained shall not extend to any estate or interest in . . . . goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration and bona fide lawfully conveyed or assured to any person or persons or bodies politick or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid."

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Mrs. Stanton, the grantor of the bill of sale, was the "true owner" of the goods and chattels at the time of the execution of the bill of sale within the meaning of s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882 (1), and that therefore the claimant was entitled to the goods and chattels comprised in the bill of sale.

The plaintiffs appealed on the ground that the Master was wrong in holding that the grantor of the bill of sale was the "true owner" of the chattels specifically described in the schedule thereto.

Beecroft for the plaintiffs. The bill of sale is void under s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882, as Mrs. Stanton the grantor was not the true owner of the goods included in the schedule thereto at the time of the execution of the bill of sale. Her title to the goods was derived under the deed of gift from her husband. That deed of gift having been declared void under 13 Eliz. c. 5 was void ab initio and the goods which were the subject of the deed of gift remained as assets in the hands of the donor and never passed out of his hands, and therefore the donee—namely, Mrs. Stanton—never was the true owner of the goods so as to be able to grant a bill of sale over them: *Bethell* v. *Stanhope* (2); *Shears* v. *Rogers*. (3) In the latter case Lord Tenterden C.J. said (4) in the course of the argument: "The assignment, if fraudulent within the meaning of the 13 Eliz. c. 5, is altogether void, and then the lease remained the property of the testator at the time of his death, and passed to his executor." Taunton J. also said (5): "By the words of the statute 13 Eliz. c. 5, s. 2, a conveyance within its scope is altogether void at law . . . . the assignment is utterly void and frustrate against creditors, and the case

(1) The Bills of Sale Act (1878) Amendment Act, 1882, s. 5: "Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner at the time of the execution of the bill of sale."

(2) (1598) Cro. Eliz. 810.

(3) (1832) 3 B. & Ad. 362.

(4) Ibid. 368.

(5) Ibid. 370.

is to be considered as if it had never been executed." Therefore when a deed of gift has been set aside as void under 13 Eliz. c. 5 it is treated as if it had never existed and as if the property had never passed out of the ownership of the donor.

[McCARDIE J. Under s. 1 of 13 Eliz. c. 5 the avoidance of a deed of gift is only a limited one—namely, as against the creditors of the grantor.]

[*Barrington-Ward K.C.* In *Curtis* v. *Price* (1) Sir W. Grant M.R. said: "A settlement of this kind is void only as against creditors: but only to the extent, in which it may be necessary to deal with the estate for their satisfaction, it is as if it had never been made. To every other purpose it is good."]

In *Hue* v. *French* (2) Kindersley V.-C. said that: "The statute of Elizabeth declared that instruments made to the intent or for the purpose of delaying, deferring or hindering creditors, as against such creditors, were void and of no effect. The manner in which Courts of equity construe that statute is, that the instrument by which a debtor makes a voluntary assignment (assuming it to be fraudulent as against creditors) is to be regarded as if it had never existed. In Roberts on Fraudulent Conveyances, c. 5, s. 5, p. 591, it is said that the construction of these conveyances has always been to treat the fraudulent gift as void, and as if it had never been made. The same proposition is laid down in the case of *Shears* v. *Rogers*." (3) The case of *Morewood* v. *South Yorkshire Ry. Co.* (4) lends some support to the case for the claimant. It was there assumed that until the fraudulent conveyance was set aside it operated to pass the property to the donee so as to entitle the donee to convey the property to a bona fide purchaser without notice.

[McCARDIE J. Pollock C.B. in the course of the argument said (5): "'Void' does not mean utterly and absolutely

(1) (1805) 12 Ves. 89, 103.
(2) (1857) 26 L. J. (Ch.) 317, 318.
(3) [1832] 3 B. & Ad. 362.
(4) 3 H. & N. 798.
(5) Ibid. 800.

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void, but void sub modo," and in his judgment he said: "Assuming the assignment to Morewood to have been fraudulent within the statute 13 Eliz. c. 5, Bayne having taken bona fide by a conveyance made by Morewood in the presence and with the assent of Watson, has a good title." Watson B. also said: "The conveyance was only void as against creditors. Morewood retained an interest until some creditor interfered. The sixth section of the 13 Eliz. c. 5 only does what justice would require, and makes her transfer for value good. In the case of a deed void as against creditors, there must be an election to avoid the deed, but before any election the property was gone out of Morewood."]

Barrington-Ward K.C. and *W. T. Monckton*, for the claimant, were not called upon.

BAILHACHE J. This is an interpleader issue, and it raises a question whether as between an execution creditor and a bill of sale holder the bill of sale holder is entitled to the goods included in the bill of sale. It appears that a man named Stanton, being in difficulties and desiring to protect his property from his creditors, executed a deed of gift to his wife. Shortly afterwards the wife granted a bill of sale of the goods comprised in the deed of gift to Winston, the claimant in the present case. The bill of sale was granted to a person who was a bona fide purchaser for value without notice, and the sole question is whether his title is better than that of the execution creditor of the husband. The matter came before Master Jelf, who came to the conclusion that the deed of gift was fraudulent and void under s. 1 of 13 Eliz. c. 5, but s. 5 of that statute preserves the title of purchasers for value without notice and therefore the title of the bill of sale holder is preserved. It is, however, contended that a bill of sale can only be granted by the true owner of the goods, and that Mrs. Stanton was not the true owner. The ground for that contention is that the deed of gift when set aside was void ab initio. But in my opinion until a deed of gift is set aside the donee under the deed of gift is the true owner of the goods comprised therein. It is true that

the donee has a defeasible title, but unless and until the deed of gift is set aside the title is a good title, and if the donee conveys to a purchaser for value without notice before the deed of gift is set aside he makes a good title. In my opinion therefore the decision of the Master was perfectly right and the appeal must be dismissed.

McCARDIE J. I agree. Sect. 1 of the statute 13 Eliz. c. 5 makes a conveyance only void sub modo. That section must be read in conjunction with s. 5, which was passed for the protection of bona fide purchasers for value without notice. It is not contended that Stanton made a transfer of his property to his wife of such a character that it could be called a colourable gift only or a mere pretence. It was an actual gift from himself to his wife, and she therefore became the owner of the goods, though it is clear that her title was subject to defeasance upon an application by the creditors of her husband under 13 Eliz. c. 5 as being in fraud of creditors. Her title, though subject to defeasance, was such that in my opinion she was entitled to transfer the property to Winston, and he thereupon became a bona fide purchaser for value without notice, and in my opinion Master Jelf was fully warranted in coming to the conclusion at which he arrived. The case of *Morewood* v. *South Yorkshire Ry. Co.* (1) indicates the principle to be applied in the interpretation of the statute, and in my view that decision is right when one considers the totality of the decisions. That decision does not stand alone; it follows *Prodgers* v. *Langham* (2) and *George* v. *Milbanke.* (3) The case of *Halifax Joint Stock Banking Co.* v. *Gledhill* (4) (a decision of Kay J.) is to the same effect. In my view the cases cited by Mr. Beecroft of *Bethell* v. *Stanhope* (5) and *Shears* v. *Rogers* (6) must be read in the light of the decisions I have already mentioned. I therefore agree that the decision of the Master was right. As regards s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882, Mrs. Stanton was in my

(1) 3 H. & N. 798.
(2) (1663) 1 Sid. 133.
(3) (1803) 9 Ves. 190.
(4) [1891] 1 Ch. 31.
(5) Cro. Eliz. 810.
(6) 3 B. & Ad. 362.

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opinion the "true owner" of the goods at the time the bill of sale was granted. If she was not the "true owner" no true owner existed.

Appeal dismissed.

Solicitors for plaintiffs: *McKenna & Co.*
Solicitors for claimant: *D. M. Phillips & Co.*

R. F. S.

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MELLOWS *v.* LOW AND OTHERS.

Landlord and Tenant—Dwelling House—Recovery of Possession—Tenant a Woman dying intestate leaving no one residing in the House—Whether Tenancy lapses—Rights of Administratrix—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*f*), (*g*).

By s. 12, sub-s. 1 (*f*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the expression "tenant" includes "any person . . . . deriving title under the original . . . . tenant."

By para. (*g*) of the same sub-section ". . . . . the expression 'tenant' includes the widow of a tenant dying intestate who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the County Court."

A single woman was the weekly tenant and sole occupier of a house which as regards rental came within the scope of the Act of 1920. During her tenancy she died intestate. Some months later her sister was appointed administratrix, but she never resided in the deceased's house, which had been sublet to another person. The landlord claimed that on the death of the tenant intestate with no member of her family residing with her in the house the tenancy lapsed, and that he was entitled to recover possession of the house:—

Held, that the administratrix was a person who derived title under the original tenant within s. 12, sub-s. 1, para. (*f*), of the Act, and that her right as tenant was not affected by the provisions of para. (*g*).

Para. (*g*) must be taken as applying only to cases where there is no executor or administrator; in other words, to cases not falling within para. (*f*).

Collis v. *Flower* [1921] 1 K. B. 409 applied.

APPEAL from Croydon County Court.

The plaintiff, the owner of a house in Croydon, claimed to recover possession of a flat on the first floor of that house,

which was let on a weekly tenancy at a rent of 14*s*. per week to a Miss Biggs, who lived there alone till January, 1922, when, having met with an accident, she was taken to a local hospital. While there she authorized her niece, Miss Low, to let the flat temporarily. Accordingly Miss Low let it in February, as it was, that is, furnished, to a Mr. Slimming. Miss Biggs, while in the hospital, died on March 19 intestate, and Mrs. Low, the mother of Miss Low, in August, 1922, obtained letters of administration to her estate. No notice to quit was ever given to Miss Biggs. Neither Mrs. Low nor Miss Low was ever in physical occupation of the flat. The plaintiff claimed that on the death of Miss Biggs the tenancy lapsed, and that he was entitled to possession; accordingly, in October, 1922, he took proceedings in Croydon County Court against Mrs. Low, Miss Low, and Mr. Slimming to recover possession.

The county court judge gave judgment for the plaintiff for possession, holding that none of the defendants came within s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

The defendants appealed.

Haydon for the defendants. The tenancy of Miss Biggs did not lapse on her death. Notice is required to determine a weekly tenancy: *Bowen* v. *Anderson* (1), and in this case no notice was ever given to Miss Biggs determining her tenancy. Further, by s. 12, sub-s. 1 (*f*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the expression "tenant" includes "any person from time to time deriving title under the original . . . . tenant." *Collis* v. *Flower* (2) decided that the executor of a deceased tenant was entitled to the protection of the Act although he was not in physical occupation of the house. The same principle applies in the case of an administrator. Mrs. Low, the administratrix of Miss Biggs, is therefore the "tenant" of this flat, and entitled to the protection of the Act.

Wedderburn for the plaintiff. *Collis* v. *Flower* (2) has no

(1) [1894] 1 Q. B. 164. (2) [1921] 1 K. B. 409.

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application. That case dealt with the position of an executor who undoubtedly derives title "under the original tenant" within s. 12, sub-s. 1 (*f*), of the Act, but this cannot be said of an administrator. It frequently happens, as indeed was the case here, that letters of administration are not taken out till months after the death of the intestate, and in such a case and where the tenancy is a weekly one, it cannot have been the intention of the Act that the landlord shall wait on the chance of some one applying for a grant of administration to whom he can look for his rent. The circumstances of the present case are exactly covered by s. 12, sub-s. 1 (*g*), of the Act, which provides that "the expression 'tenant' includes the widow of a tenant dying intestate who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court." The word "includes" used in that paragraph should be treated as equivalent to "mean and include," a meaning to which it is certainly susceptible: see per Lord Watson in *Dilworth* v. *Commissioner of Stamps.* (1) As Miss Biggs died intestate leaving no relative residing in the flat, there was no "tenant" within the meaning of the Act who could claim to occupy it, and the defendants were mere trespassers.

Haydon in reply cited s. 19 of the Court of Probate Act, 1858, which provides that between the death of an intestate and the grant of letters of administration the deceased's estate and effects vest in the judge of the Court of Probate.

McCARDIE J. I am asked by Bailhache J. to deliver judgment first in this case, which, in my opinion, raises points of considerable importance in view of the wide scope of the Rent Restrictions Act, 1920.

[His Lordship stated the facts and continued:] Was the county court judge right in giving judgment for the plaintiff? The first question is, what is the position of a weekly tenant? It is vital to remember that the letting to a weekly tenant

(1) [1899] A. C. 99, 106.

is not a letting which expires at the end of the first week or at the end of each succeeding week; in the ordinary course, as in the present case, it is a letting for a period of time which is determinable by due notice, generally regarded as a week's notice. In *Gandy* v. *Jubber* (1) the Court of Exchequer Chamber pointed out that in the case of a tenancy from year to year there is not a reletting at the commencement of every year but there is a springing interest which arises and which is only determined by a proper notice to quit. *Bowen* v. *Anderson* (2) applied the same principle to a weekly tenancy, the headnote to that case correctly stating that "a weekly tenancy does not determine without notice at the end of each week, but some notice is required to determine such a tenancy." The result therefore is, in the circumstances of this case, that on the death of Miss Biggs the tenancy did not ipso facto determine, and in my view, before the appointment of the administratrix, it must be deemed to have vested in the President of the Probate Division under s. 19 of the Court of Probate Act, 1858. Upon letters of administration being obtained by Mrs. Low her title related back to the death of Miss Biggs, and, prima facie, therefore, she acquired the continuing interest of Miss Biggs in the tenancy in the absence of any notice to quit. That would be the position at common law, and I desire to repeat what I said in *Collis* v. *Flower* (3) that all tenancies, whether long or short, prima facie vest in the executor or administrator, as the case may be, upon the death of the tenant. If that is so at common law, what is the position under the Rent Restrictions Act, 1920? It is difficult to believe that in this matter the Act substantially destroyed the common law position. Mr. Wedderburn's able argument has to a large extent been directed to the provisions of s. 12, sub-s. 1 (*f*), and (*g*), of the Act. Para. (*f*) of that section says that "the expressions 'landlord,' 'tenant' . . . . include any person from time to time deriving title under the original landlord, tenant . . . .," and, prima facie, I should have thought that these words are adequate to cover

(1) (1865) 9 B. & S. 15. (2) [1894] 1 Q. B. 164.
(3) [1921] 1 K. B. 409, 413.

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the case of an executor or administrator who succeeds to the deceased tenant. But Mr. Wedderburn points to para. (*g*) of the same section, the language of which certainly calls for consideration. Para. (*g*) says that " . . . . the expression 'tenant' includes the widow of a tenant dying intestate who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the County Court." Mr. Wedderburn says that these words oust the common law rule. He points to the word "includes" and refers to the dictum of Lord Watson in *Dilworth* v. *Commissioner of Stamps*. (1) In my view the word "includes" as used in para. (*g*) is not a term of limitation or precise definition; it means what it says—that it includes the matters thereafter mentioned; in other words, it is a word of enlargement rather than of restriction, and I am unable to hold that the language of para. (*g*) cuts down the provisions of para. (*f*). Let me take by way of illustration the case of a woman living in a villa in London rented at 100*l.*; she dies intestate, and her brother, who lives elsewhere, takes out letters of administration. It cannot be said that the moment the woman dies the landlord under para. (*g*) acquires an immediate right to possession and that the administrator has not even a right to enter for the purpose of realizing the personal effects in the house. Para. (*g*) must be taken as applying only to cases where there is no executor or administrator; in other words, to cases not falling within para. (*f*). Reference has been made to *Collis* v. *Flower*. (2) That was a decision under the Act of 1915, but the material words there in question are identical with those in para. (*f*) of the Act of 1920. I reiterate the observations of Rowlatt J. and myself as to the position of an executor under the Act, and in my opinion there is for this purpose no distinction in principle between an executor and an administrator. In this case, as no notice to quit was served, the tenancy was not a statutory tenancy, but I venture to think that even if it had been a statutory

(1) [1899] A. C. 99, 105, 106. (2) [1921] 1 K. B. 409.

tenancy the same principle would apply, and that the words of s. 15 do not affect the judgment I am giving. I think that the proposition that the same rule would apply in the case of a statutory tenancy is supported not merely by *Reeves* v. *Davies* (1), but directly by Greer J.'s decision in *Parkinson* v. *Noel.* (2) The appeal must therefore be allowed.

BAILHACHE J. This case, in my view, is really covered by *Collis* v. *Flower* (2), unless there is some difference for this purpose between the position of an executor and that of an administrator. In my opinion, apart from the fact that the administrator gets his title later than the executor, there is no difference in law between the two. The title of the administrator, as soon as it is perfected, relates back to the death. Of course all sorts of difficulties can be suggested whatever view one takes of the relevant provisions of the Act. I agree with the judgment delivered by McCardie J. and in the result that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *Mellows & Mellows.*
Solicitors for defendants: *Hamlins, Grammer & Hamlin.*

(1) [1921] 2 K. B. 486. (2) [1923] 1 K. B. 117.

J. S. H.

1923
Jan. 26.

BREWER *v.* JACOBS.

Landlord and Tenant—Statutory Tenant—Landlord's Claim for Possession—Non-payment of Rent and Breach of Covenant—Rent paid into Court before Trial—No Notice under Conveyancing Act, 1881, *of Breach of Covenant—Right of Statutory Tenant to consequent Relief—Common Law Procedure Act,* 1852 (15 *&* 16 *Vict. c.* 76), *s.* 212—*Conveyancing and Law of Property Act,* 1881 (44 *&* 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 1, 5—*Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 5, *sub-s.* 1 (*a*), *s.* 15, *sub-s.* 1.

The plaintiff let a dwelling house to the defendant for five years. At the expiration of the term the defendant remained in possession as statutory tenant. He subsequently became in arrear with rent and also committed a breach of covenant. The plaintiff issued a summons for possession on these grounds. Subsequent to the summons but before trial the defendant paid the rent and costs into Court. No notice of breach of covenant was served on the defendant under s. 14 of the Conveyancing Act, 1881. The county court judge made an order for possession:—

Held, on appeal, that as a statutory tenant the plaintiff could not claim relief under s. 212 of the Common Law Procedure Act, 1852, which enacts that proceedings shall cease on payment of rent and costs into Court, or under s. 14 of the Conveyancing Act, 1881, which enacts that as a condition precedent to re-entry notice specifying the breach must be served on the defendant, and that as he was only entitled to remain as statutory tenant on condition of observing the conditions of the tenancy, which he had broken, the county court judge was entitled, in the exercise of his discretion, to make the order for possession.

APPEAL from Clerkenwell County Court.

By an agreement dated February 5, 1917, the plaintiff, Florence Brewer, let to the defendant, Abraham Jacobs, the dwelling house, 291A Camden Road, Islington, for five years at a rent of 57*l.* per annum. The lease contained the usual stipulation for a right of re-entry on rent being in arrear for twenty-one days or for other breach of covenant. The tenancy expired in March, 1922, and, although it was not necessary, the plaintiff, by a letter dated September 26, 1921, had given notice to the defendant to give up possession at the end of the tenancy. The defendant did not do so, but, relying on the provisions of the Increase of Rent, &c. (Restrictions), Act, 1920 (10 & 11 Geo. 5, c. 17), remained in possession as a statutory tenant. The defendant

did not pay the quarter's rent due on September 29, 1922, and in October, 1922, the plaintiff issued a summons in the county court asking for an order for possession, relying as grounds justifying the claim on the non-payment of rent by the defendant and on a breach by him of an obligation of the tenancy—namely, breach of a covenant to repair—within the meaning of s. 5, sub-s. 1 (*a*), of the above Act. On November 13, 1922, the defendant paid the rent in arrear and costs into Court.

On December 11, 1922, the county court judge made an order for possession, finding as a fact that the defendant was a most undesirable tenant.

The defendant appealed.

Quass for the appellant. The county court judge had no power to make the order. With regard to the rent, at common law, when it was paid into Court the action abated, and a similar result follows under s. 212 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). And with regard to the breach of the covenant to repair, no notice under s. 14, sub-s. 1, of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), specifying the breach, etc., was served on the defendant; therefore the plaintiff's right was not enforceable. The only question is whether those Acts apply to a statutory tenant. It is submitted that they do, and that the county court judge was bound to give relief. If they do not it is admitted that the appeal must fail.

By s. 15, sub-s. 1, of the Increase of Rent, &c. (Restrictions), Act, 1920, a statutory tenant shall "so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy." No doubt, under s. 5, sub-s. 1 (*a*), he is only so entitled if he observes the terms of the tenancy; but on becoming in default he then comes within the provisions of s. 14, sub-s. 5, of the Conveyancing Act, 1881, which enacts that "a lease limited to continue as long only as the lessee abstains from committing a breach of covenant"—and, in effect, this is now such a lease—"shall be and take effect as a lease to

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continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach." And before that right of re-entry can be exercised notice under sub-s. 1 of the section must be given. The defendant, although a statutory tenant, is still a tenant.

[*Beavis* v. *Carman* (1) was referred to.]

Kimber for the respondent. This was a claim for possession after the term had expired, not for forfeiture, and the Conveyancing Act, 1881, does not apply. The defendant only held over by virtue of the Increase of Rent, &c. (Restrictions), Act, 1920, and on condition of observing its terms, which are, by s. 5, sub-s. 1 (*a*), that he pays his rent and does not break any obligation of his tenancy. The defendant has not complied with that condition in either respect. The Acts cited have no application to this statutory tenancy.

BAILHACHE J. The facts of this case are simple. The defendant was a tenant under a five years' agreement which expired in March, 1922. The plaintiff wished to get possession at the end of the term, and in September, 1921, gave the defendant notice to that effect, though a notice was not necessary. The defendant chose to take advantage of the Increase of Rent, &c. (Restrictions), Act, 1920, and remained on as a statutory tenant. He refused to pay the quarter's rent which subsequently became due on September 29, 1922. The landlord issued a summons in the county court claiming possession for non-payment of rent and for breach of a covenant to repair. The county court judge found that the rent had not been paid punctually although paid into Court, and also that there had been a breach of the covenant to repair. In these circumstances he was entitled under s. 5 of the above Act to give judgment for possession, unless the defendant was entitled to rely upon s. 212 of the Common Law Procedure Act, 1852, relating to payment of rent into Court, and s. 14 of the Conveyancing Act, 1881, which requires notice to be given of want of repair if the landlord

(1) [1920] W. N. 159.

is claiming possession on that ground. It has been contended that a statutory tenant has the same rights with regard to these sections as has an ordinary tenant. I think that that contention arises from a misapprehension of the position of a statutory tenant. But for the Increase of Rent, &c. (Restrictions), Act, he would not be a tenant at all, and he is only in possession as long as he complies with the provisions of that Act. One of those provisions is that he shall pay his rent, and another is that he shall observe the covenants in his lease. He must find his protection, if any, within the Act, and other Acts do not apply at all. In this case, no doubt, the judge might have refused to make an order of possession, but he found that the defendant was a most undesirable tenant, and he made the order, and there is no appeal from this finding of fact. I think the county court judge was right and the appeal must be dismissed.

McCARDIE J. The agreement between the plaintiff and defendant provided that the defendant should pay his rent punctually and should keep the premises in good condition and repair, and the action was brought because the defendant had not paid his rent punctually and had not kept the premises in good condition and repair, as the county court judge has found. Mr. Quass, for the defendant, in an ingenious argument, has contended that in spite of these findings the county court judge should still have refused to make an order for possession, because of the provisions of the Common Law Procedure Act, 1852, and the Conveyancing Act, 1881. That depends on the operation of those Acts when taken in conjunction or in contrast with the Increase of Rent, &c. (Restrictions), Act, 1920. It is to be observed that the term of the lease was five years, and that the term expired in the spring of 1922. After that the defendant became a statutory tenant only, for his lease had gone, and with it any question of its forfeiture. The defendant stood in a position wholly different from that of a tenant occupying under a subsisting lease for a term, and when once that fact is clearly appreciated, it seems to me that the provisions of s. 14 of the Conveyancing Act,

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1881, as to the need of notice to repair, are quite inapplicable, because they deal with the power of the Court to relieve against the forfeiture of an existing term. And the provisions also of the Common Law Procedure Act, 1852, apply to the forfeiture of an existing term. Consequently one must look to the provisions of the Increase of Rent, &c. (Restrictions), Act, 1920, to see what is the position of a statutory tenant. Sect. 15, sub-s. 1, says that he shall, so long as he retains possession, "observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy." The next relevant section is s. 5, which limits the power of the landlord to get possession as against the tenant, but gives him the right to do so in the various cases set out, among which is the one in sub-s. 1 (*a*), where rent has not been paid or any other obligation of the tenancy has been broken. Taking these sections together, it is clear that the tenant here had broken the obligations of his tenancy, and that the statutory tenancy which he possessed under s. 15 was liable to be taken away under the provisions of s. 5. The county court judge exercised the power given him, acting on ample evidence as to the circumstances. He had a discretion under the section to grant or refuse possession and he exercised it in favour of the plaintiff.

Appeal dismissed.

Solicitors for appellant: *H. W. Henniker Rance & Co.*
Solicitors for respondent: *H. S. Wright & Webb.*

W. L. L. B.

EDELL *v.* DULIEU. (1)

1923
Jan. 12.

[1922. E. 1476.]

Landlord and Tenant—Agricultural Holding—Lease with Option to determine—Notice to quit—Length of Notice—Agriculture Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 76), *ss.* 13, 28.

The Agriculture Act, 1920, s. 28, which renders a notice to quit a holding invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy, does not apply to a lease for twenty-one years with an option to the lessor to determine at the end of the first seven or fourteen years of the term.

Per McCardie, J. The Agriculture Act, 1920, s. 28, applies only to yearly tenancies.

APPEAL from judgment of a Master on a summons under Order XIV.

By an indenture of lease dated September 30, 1915, the plaintiffs John Frederick Edell and George Arthur Edell demised to the defendants Robert Dulieu and James Dulieu a farm called Wood End Green Farm, Northolt, Middlesex, at a rental of 192*l.* 10*s.* per annum for a term of twenty-one years, as from September 29, 1915. Clause 15 of the lease provided that "if the lessors shall be desirous of determining the term hereby granted at the end of the said first seven or fourteen years of the said term and shall deliver unto the lessees or leave on the said demised premises six calendar months' previous notice in writing of such desire then . . . . at the end of such seven or fourteen years as the case may be this demise shall cease and determine"; and there was a similar provision in favour of the lessees. On February 15, 1922, the plaintiffs through their solicitors gave the defendants notice in writing, in accordance with clause 15 of the lease, to quit and deliver up possession of the premises subject to the lease on the determination of the first seven years thereof —namely, on September 29, 1922.

On October 2, 1922, the plaintiffs issued a specially indorsed writ claiming possession of the demised premises. Upon a summons by the plaintiffs for judgment under

(1) Reversed in C. A. March 21.

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Order XIV. the defendants in an affidavit in opposition alleged that the notice to quit was invalid, inasmuch as it purported to terminate the tenancy "before the expiration of twelve months from the end of the then current year of the tenancy," contrary to the Agriculture Act, 1920, s. 28. (1) After hearing counsel on both sides, the Master gave judgment for the defendants, and from this judgment the plaintiffs appealed.

Holman Gregory K.C. and *Rowdand Harker* for the plaintiffs. The Agriculture Act, 1920, s. 13, provides that twelve months' notice must be given in the case of tenancies for two years or upwards where the tenancy terminates by effluxion of time. There was no corresponding provision in any previous Act and the plaintiffs do not come within that section: for the lease here was created before the commencement of the Act and is therefore excluded from s. 13 by sub-s. 3 thereof. The plaintiffs are certainly not within s. 28 because that section only applies to tenancies from year to year and not to leases; that is plain from the actual words of the section and from previous statutes upon the subject.

[He referred to Agricultural Holdings (England) Act, 1875,

(1) Agriculture Act, 1920 (10 & 11 Geo. 5, c. 76), s. 13, sub-s. 1: "In the case of a tenancy of a holding for a term of two years or upwards, the tenancy shall not terminate on the expiration of the term for which it was granted unless not less than one year nor more than two years before the date fixed for the expiration of the term a written notice has been given by either party to the other of his intention to terminate the tenancy, and any notice so given shall be deemed to be a notice to quit for the purposes of the Act of 1908 and this Act."

Sub-s. 3 (*d*): "This section shall not apply to any tenancy granted, or agreed to be granted, before the commencement of this Act."

Sub-s. 4: "In any case to which this section shall apply, it shall apply notwithstanding any agreement to the contrary."

Sect. 28, sub-s. 1: "Notwithstanding any provision in a contract of tenancy to the contrary, a notice to quit a holding shall be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy; but nothing in this section shall extend to a case where a receiving order in bankruptcy is made against the tenant."

Sub-s. 2: "Sect. 22 of the Act of 1908 (which relates to the time of notices to quit) is hereby repealed."

s. 51; the Agricultural Holdings (England) Act, 1883, s. 33; and the Agricultural Holdings Act, 1908, s. 22.]

It follows that the six months' notice given by the plaintiffs in accordance with clause 15 of the lease is valid.

Hawke K.C. and *F. Hinde* for the defendants. The Agriculture Act, 1920, s. 28, is not confined to tenancies from year to year, but applies generally to agricultural tenancies. The Act was intended to enlarge the tenant's right to compensation, and a tenant is so entitled where the tenancy was created after the passing of the Act, if it terminates by the will of the landlord. The words "notice to quit" in s. 28 or elsewhere include any notice to terminate a tenancy. That is the ordinary meaning of the words in law, and it was so held in *Ahearn* v. *Bellman.* (1) There must be twelve months' notice concluding with the then current year of tenancy—namely, Michaelmas, 1922.

In *Giddens* v. *Dodd* (2), where there was a lease for fourteen years, with an option to determine at the end of seven years, Kindersley V.-C. held that a notice in the terms of a notice to quit operated to determine the lease under the proviso.

The Agriculture Act, 1920, s. 13, only applies where the lease expires by effluxion of time and not by notice—that is to say, where notice would ordinarily be deemed unnecessary. "Expiration of the term" means the end of the term, and the section provides that the term shall not expire without notice. The Agricultural Holdings Act, 1908, s. 48, speaks of the determination of the tenancy.

[McCARDIE J. The words "expiration of tenancy" in the Agriculture Act, 1920, s. 13, do not appear to differ from the words "determination of tenancy" in the Agricultural Holdings Act, 1908, which are defined in s. 48 as "the cesser of a contract of tenancy by reason of effluxion of time or from any other cause."]

In the same section a contract of tenancy is defined as "a letting of or an agreement for letting land for a term of years, or for lives, or for lives and years, or from year to year." Sect. 28 of the Act of 1920 must be read in the light

(1) (1879) 4 Ex. D. 201. (2) (1856) 3 Drew. 485.

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of s. 48 of the Act of 1908, and when so read it appears to cover all tenancies, including that in the present case. If that were not so, the defendants would be deprived of all compensation under the Act.

Holman Gregory K.C. in reply. As regards the right to compensation, the defendants will in any case be entitled to compensation under the Act of 1908, which was in force when the lease was entered into. The Act of 1920, s. 10, only gives additional compensation. In the present case the lease was for seven, fourteen or twenty-one years, and the effect of the notice was that the lease became a lease for seven years only; it was in no sense a notice to quit. In *Giddens* v. *Dodd* (1) Kindersley V.-C. only decided that in the terms of a notice to quit he found all the elements necessary for notice limiting the tenancy to seven years. Sect. 28 of the Act of 1920 deals only with tenancies in which notice to quit is required where the tenancy is for a term less than two years.

BAILHACHE J. This is an appeal from the decision of the Master and the point is whether a lessor is obliged to give twelve months' written notice, having regard to the Agriculture Act, 1920, s. 28, in order to determine an agricultural lease for twenty-one years at the end of the first seven years, or whether six months' notice is sufficient as provided by the terms of the lease. The plaintiffs, the owners of a farm, demised it to the defendants as lessees by lease dated September 30, 1915, for a term of twenty-one years as from September 29, 1915, with an option to either party to determine at the end of the first seven or fourteen years of the term. The plaintiffs desiring to determine the lease under this clause, gave six months' notice in writing to the defendants on February 15, 1922, to take effect on September 29, 1922, seven years from the commencement of the term. It is not necessary to decide whether the lease expired on September 29, 1922, by effluxion of time or not, but I am of opinion that it did so determine. The defendants rely on the Agriculture Act, 1920, s. 28, sub-s. 1: "Not-

(1) [1856] 3 Drew. 485.

withstanding any provision in a contract of tenancy to the contrary, a notice to quit a holding shall be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy." Although these words do not aptly describe a notice to determine a possible twenty-one years' lease at the end of seven years, I am of opinion that if that section stood alone, the term "notice to quit" as used in that section might be construed as applying to a notice given for that purpose. It would be putting a strained meaning on the words, but it is possible they might have that meaning. When however s. 13 is considered, the matter appears in an entirely different light. That section provides that "in the case of a tenancy of a holding for a term of two years or upwards, the tenancy shall not terminate on the expiration of the term for which it was granted unless not less than one year nor more than two years before the date fixed for the expiration of the term a written notice has been given by either party to the other of his intention to terminate the tenancy and any notice so given shall be deemed to be a notice to quit for the purposes of the Act of 1908 and this Act." It is to be observed that the Legislature in dealing with a notice to expire at the end of a lease has used the words "notice of his intention to terminate the tenancy," which is quite a different expression from "notice to quit." It goes on to say: "If no such notice is given the tenancy shall, as from the expiration of the term for which it was granted, continue as a tenancy from year to year." The two sections together provide for two classes of tenancies. Thus, while s. 13 deals with tenancies for two years or upwards, s. 28 deals with tenancies under two years. Each section states what length of notice is necessary to bring to an end the particular class of tenancy with which it is concerned. If the present case were within either of these sections it would be within s. 13 and not within s. 28; but it is excluded from s. 13, because that section does not apply (sub-s. 3) "to any tenancy granted before the commencement of the Act." The defendants argue that this cannot be the true construction,

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because it would deprive them of their rights to compensation under the Act; but while it is true that they cannot claim under s. 10 of the Act of 1920 for disturbance, which is a new ground for compensation, they can claim under the Agricultural Holdings Act, 1908. That is to say, they can claim all the compensation to which the law would have entitled them at the time when they entered into the lease.

McCARDIE J. There is no doubt that at common law there would be no answer to the plaintiffs' claim for possession. The terms of the lease were complied with by the plaintiffs, the landlords, and the burden is therefore on the defendants to show that the plaintiffs' common law rights are cut down by statute.

It is clear that s. 13 of the Agriculture Act, 1920, does not touch the present case, because the lease was granted before the commencement of the Act and is therefore excluded by sub-s. 3. The defendants therefore rely on s. 28. [His Lordship read s. 28, sub-s. 1, and continued:] The history of that section seems to me to be important; it is practically a repetition of earlier legislation. Thus the Agricultural Holdings Act, 1875, s. 51, obliged the landlord in the case of a yearly tenancy to give twelve months' notice to quit instead of six, but there was power to contract out of the statute under s. 54 of that Act. The Agricultural Holdings Act, 1883, s. 33, and again the Agricultural Holdings Act, 1908, s. 22, repeated the same provision, and this is now reproduced in the Agriculture Act, 1920, s. 28, although in that section power to contract out of the statute is, for the first time, taken away. Thus s. 28 of the Act of 1920 appears to relate to yearly tenancies, and to my mind the explanation of the words "then current year of tenancy" is to be found in that fact.

Down to 1865 it was thought that in a yearly tenancy, where no notice to quit was given, there was a reletting for each successive year: *Gandy* v. *Jubber*. (1) Then there came the famous undelivered judgment of the Court of

(1) (1865) 5 B. & S. 485.

Exchequer Chamber in that case (1), which showed the true principle of law to be not that there was a reletting each year, but a springing interest in the tenancy which could only be determined by a notice to quit. So the "then current year of tenancy" appears to mean the current year which had sprung into existence in the absence of notice to determine by the landlord. Both the actual words and the history of the Agriculture Act, 1920, s. 28, point to the conclusion that the section is limited to yearly tenancies.

As regards the defendants' rights to compensation, I agree with my Lord that although they cannot claim under the Agriculture Act, 1920, s. 10, they can claim compensation for husbandry under the Agricultural Holdings Act, 1908.

Appeal allowed.

Solicitors for plaintiffs: *Edell & Co.*

Solicitors for defendants: *Sawyer & Withall, for Charsley & Reynolds, Slough.*

F. P. F.

PHILLIPS *v.* BRITANNIA HYGIENIC LAUNDRY COMPANY, LIMITED.

1923
Jan. 16, 17, 30.

Motor Car—Latent Defect—User on Highway—Damage caused to another Vehicle—Liability of Owner—Locomotives on Highways Act, 1896 (59 *&* 60 *Vict. c.* 36), *ss.* 6, 7—*Motor Cars* (*Use and Construction*) *Order,* 1904, *art. II., reg.* 6.

Sect. 6, sub-s. 1, of the Locomotives on Highways Act, 1896, enables regulations to be made with respect to the use of light locomotives on highways, their construction, and the conditions under which they may be used.

Sect. 7 provides that "a breach of any . . . . regulation made under this Act . . . . may, on summary conviction, be punished by a fine not exceeding 10*l.*"

By art. II., reg. 6, of the Motor Cars (Use and Construction) Order, 1904, made under the Locomotives on Highways Act, 1896, it is provided that "the motor car and all the fittings thereof shall be in such a condition as not to cause, or to be likely to cause, danger to any person on the motor car or on any highway."

Owing to a defect in the axle of the defendants' motor lorry a wheel

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(1) (1865) 9 B. & S. 15.

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came off while the lorry was being driven in a public highway, and damaged the plaintiff's van. Two days before the accident, the defendants had received back the lorry from the makers, a firm of known competence, to whom it had been sent to be overhauled and repaired. In an action by the plaintiff for the damage sustained, the county court judge found that the defendants were not, but that the repairers were, negligent, and he gave judgment for the plaintiff on the ground that there had been a breach of art. II., reg. 6, of the above Order, which breach caused the damage:—

Held, (1.) that the mere breach of art. II., reg. 6, did not of itself afford a cause of action to the plaintiff; (2.) that the defendants did not at common law owe an absolute duty to the plaintiff that the lorry should be in a safe and proper condition; (3.) that the defendants were not liable for the alleged negligence of the repairers; (4.) that the lorry was not in itself a nuisance; and therefore (5.) that the plaintiff having failed to establish knowledge or negligence on the part of the defendants was not entitled to recover.

Tarry v. *Ashton* (1876) 1 Q. B. D. 314; *Sadler* v. *South Staffordshire, &c., Tramways Co.* (1889) 23 Q. B. D. 17; *Groves* v. *Lord Wimborne* [1898] 2 Q. B. 402; and *Britannic Merthyr Coal Co.* v. *David* [1910] A. C. 74 distinguished. Principle of *Saunders* v. *Holborn District Board of Works* [1895] 1 Q. B. 64 applied.

APPEAL from Lambeth County Court.

The plaintiff sued the defendants for damages in these circumstances: The defendants' servant was driving their motor lorry in Camberwell New Road, when one of the axles broke in two, a wheel came off, ran along the road and struck the plaintiff's van, damaging it. The defendants, who had had the motor lorry for some time before the accident, sent it about seven weeks before that occurrence to the makers, Messrs. Thornycroft, a firm admittedly of the highest competence and repute, to be overhauled and repaired. Messrs. Thornycroft's men effected various repairs, replacing one worn axle with a new one, and rethreading and annealing the other, which was seen to be defective, although they did not consider it necessary to replace it with a new axle. The repairs, in respect of which no restriction was put by the defendants, cost nearly 200*l*. The motor lorry was sent back to the defendants two days only before the accident.

The plaintiff's particulars of claim in the action were based on negligence by the defendants, but at the trial the plaintiff also relied upon other grounds, the main one being that the defendants had been guilty of a breach of art. II., reg. 6,

of the Motor Cars (Use and Construction) Order, 1904, made under the Locomotives on Highways Act, 1896, and that the breach of the regulation caused the damage.

The county court judge held that the defendants were not negligent, but that Messrs. Thornycroft were negligent in not having replaced the defective axle with a new one, and he gave judgment for the plaintiff for 17*l.* 10*s.*, basing his decision on the defendants' breach of above-mentioned art. II., reg. 6, which breach, as he found, caused the damage to the plaintiff.

The defendants, by leave, appealed.

Doughty for the defendants. The county court judge was wrong in holding that art. II., reg. 6, of the Motor Cars (Use and Construction) Order, 1904, imposes an absolute obligation on the owner of a motor car to ensure that his car is in such a condition as not to cause, or to be likely to cause, danger. The Order of 1904 was made under the Locomotives on Highways Act, 1896, which by s. 7 provides that a breach of any regulation made under the Act is punishable by a fine not exceeding 10*l.* Before 1861 any kind of vehicle might use the highway, and there was no liability at common law to the effect provided by art. II., reg. 6, which is thus a new liability, and as a remedy for its breach is specifically provided that remedy alone must be followed: *Wolverhampton New Waterworks Co.* v. *Hawkesford.* (1) The regulation in question is purely of a police character. It is true that the Court of Appeal in *Groves* v. *Lord Wimborne* (2) and the House of Lords in *Britannic Merthyr Coal Co.* v. *David* (3) held that the breach of a rule from which damage flowed gave the person suffering the damage a right of action, but those cases are distinguishable on the ground that the rules, for the breach of which the actions were brought, were made for the protection of particular classes of persons—factory workers in the one case, and miners in the other. Here the regulation is not for the protection of a particular class of

(1) (1859) 6 C. B. (N. S.) 336, 356. (2) [1898] 2 Q. B. 402.
(3) [1910] A. C. 74.

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persons. In *Hutchins* v. *Maunder* (1) Darling J. held that to put a car with defective steering gear on the highway amounts to negligence. The decision there was not based on a breach of reg. 6, and it is doubtful whether it can be supported.

Apart from negligence on their part, which in this case has been negatived, the defendants cannot be held liable. A motor car which the owner has taken every precaution to see is in good condition but which in fact breaks down owing to some latent defect cannot be said to be a nuisance : *Wing* v. *London General Omnibus Co.* (2) Further the defendants are not liable for the negligence, if there was negligence, of Messrs. Thornycroft, for where a competent contractor is employed the person employing him is not liable to a third person for the contractor's negligence : *Daniel* v. *Metropolitan Ry. Co.* (3)

[*Earl* v. *Lubbock* (4) was also referred to.]

Martin O'Connor (*J. P. Rutherford* with him) for the plaintiff. There is an absolute duty imposed upon the owner of a motor vehicle by art. II., reg. 6, of the Motor Cars (Use and Construction) Order, 1904, that the vehicle is fit to use the highway safely ; and as the Order was made in the interest of public safety it is contrary to the intention of the Legislature to say that the liability to a penalty of 10*l.* for a breach of the regulation is the sole remedy open to a person who has suffered damage by that breach. On this point *Groves* v. *Lord Wimborne* (5) and *Britannic Merthyr Coal Co.* v. *David* (6) are directly in point. Further, the principle of the decision in *Sadler* v. *South Staffordshire, &c., Tramways Co.* (7) applies. There it was held that the statutory powers of the defendants could not be taken to authorize them to run their tramcars along the highway in a defective condition, and as they did so in fact and thereby occasioned injury to the plaintiff they were liable in damages. Moreover, apart from art. II.,

(1) (1920) 37 Times L. R. 72.
(2) [1909] 2 K. B. 652.
(3) (1871) L. R. 5 H. L. 45, 61.
(4) [1905] 1 K. B. 253.
(5) [1898] 2 Q. B. 402.
(6) [1910] A. C. 74.
(7) 23 Q. B. D. 17.

reg. 6, of the Order of 1904 the defendants are under an absolute duty to see that their motor vehicle is roadworthy and not dangerous. In *Welsh* v. *Lawrence* (1) the owner of a horse-drawn vehicle was held liable for injury caused through the chain-stay breaking, in consequence of which the horse was frightened and ran away. Lord Ellenborough there said that "the master is bound to have good tackle, and is negligent if he does not." *Hutchins* v. *Maunder* (2) also supports this view. The defendants' liability may also be put on the principle of *Tarry* v. *Ashton* (3), or on their responsibility for the negligence of Thornycroft's men, or on the ground that a motor vehicle which has a defective axle and therefore liable at any moment to break down is a nuisance. Sect. 13 of the Locomotive Act, 1861, provides that a person using on a highway a locomotive engine which is a nuisance shall be liable to an indictment or action. In *Wing* v. *London General Omnibus Co.* (4), upon which reliance is placed for the defendants, the decision turned on the absence of any defect in the vehicle itself. That case is therefore distinguishable from the present, where there was a defect in the motor lorry, which defect caused the accident.

[He also referred to *Pickard* v. *Smith* (5); *Rooney* v. *Allan* (6); *Ward* v. *Hobbs* (7); *Cox* v. *Coulson* (8); and *Mansel* v. *Webb.* (9)]

Doughty replied.

Cur. adv. vult.

Jan. 30. McCARDIE J. read the following judgment: My Lord has asked me to deliver my judgment first in this case.

This is the defendants' appeal by leave from the judgment of the learned judge of the Lambeth County Court awarding 17*l.* 10*s.* damages to the plaintiff. The appeal raises several legal questions of practical importance. [His Lordship stated the facts and continued:] The learned judge completely,

(1) (1818) 2 Chitty, 262.
(2) [1920] 37 Times L. R. 72.
(3) 1 Q. B. D. 314.
(4) [1909] 2 K. B. 652.
(5) (1861) 10 C. B. (N. S.) 470.
(6) (1883) 10 R. 1224.
(7) (1878) 4 App. Cas. 13.
(8) [1916] 2 K. B. 177.
(9) (1918) 120 L. T. 360.

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and, in my view, rightly, exonerated the defendants and their servants from negligence. There was, I think, no evidence of neglect by them. He found, however, that Messrs. Thornycroft were negligent in that the axle which subsequently broke should have been replaced with a new one rather than rethreaded and annealed. Whether the evidence sufficed to justify a finding of negligence against Messrs. Thornycroft need not be discussed. This finding was accepted by counsel as the basis of argument. It is unnecessary to consider whether or not the plaintiff could have successfully sued Messrs. Thornycroft: see *Winterbottom* v. *Wright* (1); *Earl* v. *Lubbock* (2); Pollock on Torts, 11th ed., pp. 554, 555.

The question is whether the appellant defendants are liable to the plaintiff. The learned county court judge rested his decision on the breach by the defendants of art. II., reg. 6, of the Motor Cars (Use and Construction) Order, 1904, made under the Locomotives on Highways Act, 1896, whereby, as he found, damage resulted to the plaintiff. The plaintiff also rested his claim, as I have said, on other grounds. It will be convenient to consider them later and separately. The contention of the plaintiff with respect to the breach of the above-mentioned regulation raises a point of wide practical importance. It arises for the first time for direct consideration. Art. II., reg. 6, is as follows: "The motor car and all the fittings thereof shall be in such a condition as not to cause, or to be likely to cause, danger to any person on the motor car or on any highway." I point out that the words are "danger to any person," not "danger to any property": see *Gorris* v. *Scott.* (3) It may well be, however, that that which is dangerous to persons is also dangerous to property on the highway. The Motor Cars Order of 1904 was made under the Locomotives on Highways Act, 1896, which provides (s. 6): "The Local Government Board may make regulations with respect to the use of light locomotives on highways, and their construction, and the conditions under which they may be used." The Regulations of 1904 are large

(1) (1842) 10 M. & W. 109. (2) [1905] 1 K. B. 253.
(3) (1874) L. R. 9 Ex. 125.

in number. They embrace many details as to weight of car, tyres, brakes, lamps, lights and the like. There are provisions as to causing the car to be moved backwards; as to keeping on the left side of the road, as to passing traffic on the offside, as to sounding a bell, etc. The Regulations of 1904 must be considered together with the provisions of the Motor Car Act, 1903, and the Regulations of 1903 made thereunder. The Acts of 1896 and 1903 are to be read together (see s. 20 of the Act of 1903). Thus there exists a very detailed body of Regulations with regard to motor cars and motor traffic. If any breach of those Regulations causing damage to a person or property is actionable even in spite of proof by a defendant of the utmost care, then a serious vista of liability is opened. It is to be noticed that art. II., reg. 6, is apparently imperative in its wording. It does not say that due care shall be used. The words are "The motor car shall be in such a condition," etc. Apparently an offence against the regulation may be committed in spite of the utmost care by the defendant, and even though he be entirely ignorant of any defect. Neither mens rea nor negligence seem to be ingredients of the offence: see *Cundy* v. *Le Cocq* (1) and the cases cited in Stone's Justices' Manual (1922) at p. 1105. The penalty for any breach may be 10*l.* (see s. 7 of the Locomotives on Highways Act, 1896). If, however, a breach be merely technical the justices may impose a nominal penalty only. But if an action lies for a breach there is no power in the civil Court to modify the damages so as to accord with the actual blame. The Motor Car Acts and Regulations contain no provision for the payment of compensation to a person injured by a breach.

In these circumstances the question is whether or not the plaintiff can base a cause of action under art. II., reg. 6, on the ground that the defendants' lorry was in such a condition as to cause, or to be likely to cause, danger. It is plain that even a latent defect (such as here existed) may cause danger. In fact it here caused damage to the plaintiff. If the plaintiff can show that a breach of the regulation (quite apart from any

(1) (1884) 13 Q. B. D. 207.

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proof of negligence or knowledge by the defendants) is actionable he is entitled to succeed. The question must, I think, be decided on a consideration of the nature, scope, purpose and effect of the Motor Car Acts and Regulations. The governing principle, in my view, is still as it used to be, in spite of recent decisions. It is this: If a statute creates a new duty or imposes a new liability, and prescribes a specific remedy in case of neglect to perform the duty or discharge the liability, the general rule is that "no remedy can be taken but the particular remedy prescribed by the statute": see per Denison J. in *Stevens* v. *Evans* (1) and the decisions cited in Craies' Statute Law, 4th ed., p. 219. The plaintiff, however, relied on two well-known decisions: first *Groves* v. *Lord Wimborne.* (2) At first sight that decision seems to favour the plaintiff. It certainly establishes the proposition that the mere fact that a statute provides for a penalty does not of itself preclude a civil action for damage caused by breach of a statutory duty. In *Groves* v. *Lord Wimborne* (2) the plaintiff recovered damage for breach of the absolute duty on the defendant to fence his dangerous machinery under s. 5 of the Factory and Workshop Act, 1878. When, however, the decision of the Court of Appeal is examined it will be seen that the judgments rest on the circumstance that the Factory Acts were passed, not for the benefit of the public generally, but for the benefit of a particular class of persons—namely, factory employees. Thus Smith L.J. said (3): "It is material, as Kelly C.B. pointed out in giving judgment in the case of *Gorris* v. *Scott* (4), to consider for whose benefit the Act was passed, whether it was passed in the interests of the public at large or in those of a particular class of persons." See also what Rigby L.J. said (5): "The provisions of s. 5 are intended for the protection from injury of a particular class of persons, who come within the mischief of the Act." So too per Vaughan Williams L.J. (6) I may point out that the argument of plaintiff's counsel in *Groves* v.

(1) (1761) 2 Burr. 1152, 1157.
(2) [1898] 2 Q. B. 402.
(3) Ibid. 407.
(4) L. R. 9 Ex. 125.
(5) [1898] 2 Q. B. 414.
(6) Ibid. 415.

Lord Wimborne (1) rested expressly on the fact that s. 5 of the Factory Act, 1878, was passed for the benefit of a special class of person. The second case relied on by plaintiff's counsel was *Britannic Merthyr Coal Co.* v. *David.* (2) There the plaintiff apparently recovered his damages for breach by the defendants of the Coal Mines Regulation Acts, though negligence also was alleged. In the *Britannic Co.'s Case* (2), however, it is plain that the regulations were created for the benefit of a particular class only, to wit, miners.

In my view, the Motor Car Acts and Regulations were not enacted for the benefit of any particular class of folk. They are provisions for the benefit of the whole public, whether pedestrians or vehicle users, whether aliens or British citizens, and whether working or walking or standing upon the highway. In *Butler* v. *Fife Coal Co.* (3) Lord Kinnear said: "We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended." This, I think, is the dominant test. In my opinion the present case does not fall within *Groves* v. *Lord Wimborne* (1) nor the *Britannic Case* (2), but within the line of decisions well illustrated by *Saunders* v. *Holborn District Board of Works.* (4) It was there held by Mathew and Charles JJ. that the plaintiff, who had suffered damage by a fall through the failure of the defendants to remove snow from a street in their district, could not recover for his loss. They held that s. 29 of the Public Health (London) Act, 1891, which imposed a duty on the defendants to remove refuse, etc., from their streets did not give any right of action to a person suffering special damage from a breach of such duty. The ratio of that decision is strikingly adverse to the plaintiff here. See also the ratio of the Court in *Maguire* v. *Liverpool Corporation* (5) and the judgment of Farwell J. in *Mullis* v. *Hubbard.* (6) I desire to say that in my view *Saunders* v. *Holborn District Board of Works* (4) is a good illustration of the rule laid down

(1) [1898] 2 Q. B. 402.
(2) [1910] A. C. 74.
(3) [1912] A. C. 149, 165.
(4) [1895] 1 Q. B. 64.
(5) [1905] 1 K. B. 767.
(6) [1903] 2 Ch. 431.

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by the House of Lords in *Ward* v. *Hobbs* (1)—namely, that a man may, under the terms of an Act of Parliament, be legally culpable and yet his conduct may not give rise to any right of action to a private individual who is injured thereby. The statute there in question was passed for the benefit of the general public. See also Pollock on Torts, 11th ed., p. 197.

It is not without interest to refer to the Highway Act, 1835, which contains many provisions as to vehicular traffic, e.g., s. 78, which provides that a person driving a vehicle shall keep on the left side of the road. So far as I know, it has not been held that a mere breach of such, or the like, regulation ipso facto gives a cause of action for damage. On the contrary, it has been held that in cases of collision there is no such rule of the road as to make the left always the proper side: see the cases cited in the notes to s. 78 of the Act of 1835 in Pratt's Law of Highways, 16th ed., p. 264. So, too, it is still existing law, I think, that in spite of s. 78 a man may sometimes, and without negligence, keep on his right-hand side, and, indeed, if by so doing he can avoid a collision, it is his duty to do so: see *Pluckwell* v. *Wilson* (2); *Clay* v. *Wood* (3); and Clerk and Lindsell on Torts, 7th ed., p. 457. The provisions of, for example, the Highways Act and the Motor Car Acts and Regulations seem to rest on the same footing. They are, I think, police provisions rather than enactments declaring civil liability. Thus, I think, that in the case of a motor car, it may sometimes be not only desirable, but essential for the purposes of avoiding civil liability temporarily to exceed a speed of twenty miles an hour or to go upon what is prima facie the wrong side of the road. To do so may sometimes afford the only method of avoiding a serious accident.

I agree, however, that the breach of a statutory regulation will usually afford prima facie evidence of negligence. The view I am now expressing seems to accord with the opinion of the Divisional Court and the Court of Appeal in *Wintle* v.

(1) 4 App. Cas. 13. (2) (1832) 5 C. & P. 375.
(3) (1803) 5 Esp. 44.

Bristol Tramways and Carriage Co. (1)—namely, that the Motor Car Acts and Regulations do not in themselves set the standard of care required for the purposes of civil actions. If we were to approve the plaintiff's submission here that the defendants' duty is absolute, a stranger would possess a greater right to care than is possessed by a passenger for reward against a person driving him: see *Hyman* v. *Nye* (2); *Readhead* v. *Midland Ry. Co.* (3) It must be remembered that the common law gives a person injured an ample measure of protection by virtue of the legal rules as to negligence and nuisance. A high degree of care is required from those who drive motor cars. I respectfully agree with the view expressed by the late Mr. Beven in his well-known work on Negligence, 3rd ed., vol. i., p. 440. He there says (after referring to the Motor Car Acts and Regulations): "These alterations in the law, while they permit the use of motor-cars and regulate their user, are directed to the public and police aspects of the case, and do not affect individual rights or remedies." The passage in which these words appear is, I think, illuminating and most relevant to the present case. The Motor Car Regulations in question have existed nearly twenty years. Yet the point now raised has not been suggested in the numerous cases of accident which have been before the Nisi Prius Courts and the Court of Appeal. In every case, I believe, the allegation has been that of negligence, and the breach of a statutory regulation has been alleged not as a cause of action in itself, but as evidence of a breach of the common law duty to take duo care. The view expressed by Mr. Beven has always been adopted by the Courts, whether with respect to the question of speed or the proper side of the road or the condition of a vehicle or otherwise. For the reasons given, I am of opinion that the learned county court judge erroneously held that a mere breach of art. II., reg. 6, afforded in itself a cause of action to the plaintiff for the damage he sustained. If the Legislature desires to cast an absolute duty on motor-car

(1) (1916) 116 L. T. 125; (1917) 117 L. T. 238.

(2) (1881) 6 Q. B. D. 685.

(3) (1869) L. R. 4 Q. B. 379.

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owners, the purpose should be effected by plain words in an Act of Parliament, and not by a somewhat obscure regulation of a police character.

Mr. O'Connor next contended, in the course of his able argument for the plaintiff, that, even apart from the Motor Car Regulations, the defendants owed an absolute duty at common law to the plaintiff that the motor lorry should be in a safe and proper condition and that for a breach of this alleged duty causing damage the plaintiff was entitled to recover. This again is an important and somewhat novel point in view of the practice of the High Court for many years in cases of accident. In every case of highway accident, I believe, actual negligence has been pleaded and sought to be proved against the defendant. It is, however, proper to recognize that certain dicta exist which may appear somewhat to support the plaintiff's contention. In *Welsh* v. *Lawrence* (1) the plaintiff's horse was killed by the defendant's cart, of which the chain-stay had broken, and the defendant's horse, being frightened, ran away. Lord Ellenborough said: "The master is bound to have good tackle." On these words Mr. O'Connor relied. But it will be seen at once that the full observation of Lord Ellenborough is this: "The master is bound to have good tackle, and is negligent if he does not," and Bayley J. said: "If he is driving negligently as to the tackle, he is driving negligently." The action it is to be noted was for negligence, and on this ground the plaintiff succeeded. I think that the true effect of the case is stated in Beven on Negligence, 3rd ed., vol. i., p. 544, as follows: "If any circumstance can be shown which affects the owner with negligence in not providing good tackle, to which he is bound, he will be held liable." In *Cotterill* v. *Starkey* (2) Patteson J. said of the defendant: "He is bound to have proper tackle." But that case was framed on trespass and must now be read in the light of the authorities cited by Denman J. in *Stanley* v. *Powell*. (3) Moreover, the jury in *Cotterill* v. *Starkey* (2) expressly found that the defendant

(1) 2 Chitty, 262.

(2) (1839) 8 C. & P. 691, 694.

(3) [1891] 1 Q. B. 86.

was in fault; and the note at p. 694 of the report is not, I think, favourable to the present plaintiff's contention. In *Hutchins* v. *Maunder* (1) Darling J. appears to have followed (so I gather) the dicta of Lord Ellenborough in *Welsh's Case* (2) and of Patteson J. in *Cotterill's Case.* (3) In the case before him he found for the plaintiff against the defendant in respect of an accident caused by the defective steering gear of the defendant's motor car, although the defendant did not know and could not even with care have discovered the defect. The learned judge said he found, however, "that to place the car on the highway in its then condition was a thing necessarily dangerous to persons who used the highway, and it amounted to negligence." The action, I observe, was based on negligence. I respectfully confess that I do not see how a person can be guilty of negligence unless he is guilty of a want of due care. See as to the meaning of negligence per Alderson B. in *Blyth* v. *Birmingham Water Works* (4) and Pollock on Torts, 11th ed., pp. 441–2. If Darling J. meant to hold that the defendant's duty in the case before him was absolute, then it would follow that if a man is driving his newly purchased car from the works of makers of high repute, and an accident at once occurs through some latent fault in the interior mechanism whereby damage is caused to a third person, he must be held liable, even though he was wholly unaware of the defect and had taken every possible care to assure himself that the car was in perfect order.

In my humble opinion, such is not, nor ought it to be, the law. The burden would seem unjust. In my view the dicta in the cases of *Welsh* v. *Lawrence* (2); *Cotterill* v. *Starkey* (5); and the apparent decision in *Hutchins* v. *Maunder* (1) are not only inconsistent with, for example, *Templeman* v. *Haydon* (6), but with a great body of case law. I need not go through the decisions in detail. In my opinion the law is correctly stated in Halsbury, vol. xxi., para. 699—

(1) 37 Times L. R. 72.
(2) 2 Chitty, 262.
(3) (1839) 8 C. & P. 691, 694.
(4) (1856) 11 Ex. 781, 784.
(5) 8 C. & P. 691.
(6) (1852) 12 C. B. 507.

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namely: "Driving with defective apparatus if the defect might reasonably have been discovered, or with a horse improperly harnessed . . . . are negligent acts, which render a defendant liable for injuries of which they are the effective cause." So, too, in Clerk and Lindsell on Torts, 7th ed., p. 456, the law is, I believe, correctly stated as follows: "Foremost among the class of cases in which, in the absence of wilfulness, negligence is an essential ingredient in liability, come cases of injury caused by chattels which, having been set in motion by the defendant, have come into collision with the plaintiff or his property." See also Beven on Negligence, 3rd ed., vol. i., pp. 541 et seq. I need not analyse the decisions cited in the above text-books. It is interesting to observe the case of *The European.* (1) There the defendant's steamship, fitted with a patent steering gear, ran into a vessel at anchor in the Thames, owing to the steering gear suddenly not acting owing to some derangement. It was held by Butt J. that the defendants were not liable unless negligence was proved. The judgment of that learned judge is clearly adverse to the plaintiff's contention in the present case. So, too, I think that the reasoning of the Privy Council, upon somewhat different facts, in *Moffatt* v. *Bateman* (2) is against the present plaintiff. Again, I venture to point out that if the plaintiff's contention be correct he would possess a higher right than is possessed by a passenger for reward against a person who undertakes to convey him: see *Hyman* v. *Nye* (3) already cited.

It seems clear that a person who drives or rides a horse upon a highway cannot be deemed to undertake in favour of strangers that the horse is free from vice. There is no quasi warranty of the fitness of a horse in favour of the public. Knowledge of defect in the horse, or some negligent act or omission, must be proved: see *Hammack* v. *White* (4) and *Holmes* v. *Mather.* (5) In the last-named case Bramwell B. said (6): "For the convenience of mankind in carrying on

(1) (1885) 10 P. D. 99.
(2) (1869) L. R. 3 P. C. 115.
(3) 6 Q. B. D. 685.
(4) (1862) 11 C. B. (N. S.) 588.
(5) (1875) L. R. 10 Ex. 261.
(6) Ibid. 267.

the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid." In my view it is reasonably clear on principle that just as no absolute duty at common law exists as against owners of horses, so no absolute duty exists with respect to motor cars. I am, therefore, against the second contention of the plaintiff. I think that the general existing practice at Nisi Prius, of requiring some prima facie evidence of misconduct or negligence against a defendant, is correct, is sound in principle, and consistent with the main body of authority.

It remains to consider several other points argued before us. Mr. O'Connor claimed that he could base his claim (apart from the points already dealt with) on the principle of *Tarry* v. *Ashton* (1), the lamp case. I need not state the facts of that well-known decision. In my opinion that case does not here apply. It related to property immediately abutting upon the highway and with respect to which a special branch of law exists. A different law applies to movable chattels. This was pointed out so early as 1840 by Parke B. in *Quarman* v. *Burnett* (2): see also per Butt J. in *The European*. (3) In Pollock on Torts, 11th ed., p. 526, several decisions are referred to and the learned author says: "Combining the principles affirmed in these authorities, we see that the occupier of property abutting on a highway is under a positive duty to keep his property from being a cause of danger to the public by reason of any defect either in structure, repair, or use and management, which reasonable care and skill can guard against." I desire to add that in my view *Tarry* v. *Ashton* (1) may also be supported on the principle of *Rylands* v. *Fletcher*. (4)

It was further argued for the plaintiff that the defendants ought here to be held responsible for the negligence of Messrs. Thornycroft even apart from the case of *Tarry* v. *Ashton*. (1) The result of this might well be to make an owner responsible for any negligence on the part of the

(1) 1 Q. B. D. 314.
(2) (1840) 6 M. & W. 499, 511.
(3) 10 P. D. 99, 101.
(4) (1868) L. R. 3 H. L. 330.

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manufacturer who made the vehicle or of the independent contractor who undertook to repair it. In certain special cases a person is responsible for the acts of an independent contractor. Those cases are clearly set out in Clerk and Lindsell on Torts, 7th ed., pp. 107 and 110 et seq. The present state of facts does not fall within them. In the action before us the defendants acted with care and propriety in sending the lorry for overhaul and repair to Messrs. Thornycroft. It might well have been negligent in the defendants to have attempted to do the work themselves. The duty of care can sometimes only be properly fulfilled by the engagement of an independent and skilled contractor: see the useful observations of Denman J. in *Kiddle* v. *Lovett* (1) and the remarks of the Privy Council in *Moffatt* v. *Bateman.* (2)

It only remains briefly to notice two further contentions of the plaintiff. First, that the present facts fall within the case of *Sadler* v. *South Staffordshire, &c., Tramways Co.* (3) In my view that decision of the Court of Appeal does not here apply. It is not easy to discover the ratio of the judgments. The accident there happened through defective points in the tramline used by the defendants. It seems to have been clear and admitted that the defendants could have detected the defect by inspection. They failed to do so and hence the accident. The decision was given, I think, upon the special effect of the Tramways Acts, and the duty thereby cast on the defendants. Unless such be the ratio it is difficult to reconcile the decision with the well-known principle of the railway cases: see, for example, *Vaughan* v. *Taff Vale Ry. Co.* (4) and Pollock on Torts, 11th ed., p. 133. It must be remembered, moreover, that the creation of a tramline involves the cutting up of a highway, and the statutory permission to do so is given under special conditions. Without statutory power the interference with a highway would be an indictable nuisance. In the case of a motor car, however, there is nothing at common law which prevents it from being run on a highway, subject to liability for

(1) (1885) 16 Q. B. D. 605, 611.
(2) L. R. 3 P. C. 115, 123.
(3) 23 Q. B. D. 17.
(4) (1860) 5 H. & N. 679.

negligence and nuisance. *Sadler's Case* (1) must rest either on negligence or on the obvious and avoidable breach of a particular statutory duty. It seems to be, so far as I follow it, sui generis. Secondly, it was suggested that the defendants' lorry must, having regard to the defective axle, be regarded as a nuisance. Now it is plain that a motor car is not in itself a nuisance although liable to skid in wet weather: see *Wing* v. *London General Omnibus Co.* (2) It seems to me that the county court judge here did not find, nor could he properly have found, that the defendants' lorry was a nuisance. Such a finding would involve that the owner of every vehicle is liable for every latent defect causing injury, quite apart from any proof of knowledge or of negligence. So to hold would be contrary to the express or implied effect of the general body of decisions. In the case now before us the defendants did not know, nor did they negligently fail to know, of the defect in their lorry. It cannot, therefore, be said that they either caused, or in any way permitted, a nuisance: see for example *Tarry* v. *Ashton* (3), per Blackburn J.

For the reasons given, I am of opinion that the decision of the learned county court judge was erroneous. In my view the appeal should be allowed and judgment entered for the defendants with costs here and below.

BAILHACHE J. I am of the same opinion. After the very elaborate judgment of McCardie J., it is only necessary for me to say a few words.

In substance, two points were raised in this case: the first, and the one mainly relied on, was that by virtue of the Regulations made under the Locomotives on Highways Act, 1896, an absolute duty was laid upon the owner of a motor car in putting it upon the road to have it in good order. For the reasons which McCardie J. has given I have come to the conclusion that those Regulations have not that far-reaching effect, and I do not think there would be any doubt at all about it but for the case of *Sadler* v. *South Staffordshire*,

(1) 23 Q. B. D. 17. (2) [1909] 2 K. B. 652.
(3) 1 Q. B. D. 314, 317, 319.

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&c., Tramways Co. (1) It may be that that case can be explained on the ground that it has reference only to tramway companies using the highway, which, apart from statute, have no right to use the highway at all, or to cut it up for the purpose of laying their tramlines. But it is to my mind clear that the judgment of Lindley L.J. at any rate was based on negligence. He laid great stress on the fact that, although the points which were defective had not been laid down by the company that was sued, but by another company, yet the company which was sued had the right and duty to see that the points were in order and to call on the company that laid them to put them in order, and he bases his judgment on their failure to exercise that duty; that is to say, he bases it on their negligence.

The remaining point is that there is a common law duty on the owner of a motor vehicle to have it reasonably fit for the road. In my judgment that is not a correct statement of the duty. Correctly stated the duty is to take reasonable care that the motor vehicle shall be fit for the road. That is quite a different thing from the duty to have it reasonably fit for the road. If the duty were to have it reasonably fit for the road it might well be that, although the owner of the vehicle had entrusted his repairs to a competent repairer, he would be liable to a person who suffered injury upon the high road if the competent repairer were negligent. If, on the other hand, the duty is, as I hold it is, to take reasonable care to have his vehicle fit, then that duty is discharged by the owner of the vehicle who puts it into the hands of a competent repairer with instructions to do what is necessary to put it in a fit state to use the road. For these reasons, and for the reasons given in my brother's very careful and elaborate judgment, I have come to the conclusion that this appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *J. Nixon Watts & Co.*
Solicitors for defendants: *Lewis Barnes & Co.*

(1) 23 Q. B. D. 17.

J. S. H.

[IN THE COURT OF APPEAL.]

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Money Lender—Registered Name—Advance on Promissory Note—Repayment by post-dated Cheques payable to Nominees of Money Lender—Taking "security for money" in course of business as Money Lender otherwise than in registered Name—Money Lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*b*) (*c*).

The plaintiffs, who were money lenders registered in the name of C. Stirling, advanced to the defendant the sum of 1000*l.* on the security of a promissory note for 1600*l.* to be repaid in eight consecutive monthly payments of 200*l.* each. At the same time the defendant gave to the plaintiffs eight cheques, each post dated so as to correspond with one of the eight consecutive monthly payments stipulated for in the promissory note. The cheques were made payable, not to the plaintiffs in their registered name, but to nominees who were in their employ. Two of the cheques were duly met, but the next two were dishonoured. In an action by the plaintiffs to recover the amounts unpaid with interest:—

Held, that the taking of the cheques by the plaintiffs in the names of nominees was the taking of "a security for money" otherwise than in the money lenders' registered name, within s. 2, sub-s. 1, of the Money Lenders Act, 1900, and the transaction was consequently illegal and void.

Decision of Bailhache J. reversed.

APPEAL from a decision of Bailhache J.

On December 15, 1921, the defendant Sir Edwin John borrowed from the plaintiffs C. & J. Stone, who were registered as money lenders under the name of C. Stirling, the sum of 1000*l.* upon the security of a promissory note in the following terms: "I promise to pay to C. Stirling or order the sum of 1600*l.* for value received by eight consecutive monthly payments of 200*l.* each, the first of such payments to become due and payable on January 15, 1922, together with interest thereon at the rate of one shilling per pound per month." At the request of the defendant the cheque for 1000*l.* which he received from the plaintiffs was made payable to A. Janesük. At the same time the defendant gave to the plaintiffs eight cheques for 200*l.*, each post-dated to correspond with the dates of the eight consecutive monthly

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payments. These cheques, as found by Bailhache J., were at the request of the defendant and for his convenience made payable to two employees of the plaintiffs. Two of the cheques were duly met, but the next two were dishonoured. The plaintiffs then sued the defendant for the amounts unpaid with interest. Bailhache J. gave judgment for the plaintiffs, holding: (1.) that the arrangement as to repayment of the loan by cheques drawn in favour of the plaintiffs' nominees did not constitute an agreement entered into otherwise than in the plaintiffs' registered name within s. 2, sub-s. 1 (*c*), of the Money Lenders Act, 1900, there being no attempt to conceal the identity of the money lenders from the borrower; and (2.) that the taking of the post-dated cheques payable to other persons was not the taking of a "security for money" otherwise than in the plaintiffs' registered name within the same sub-section.

The defendant appealed.

Harold Morris K.C. and *Macaskie* for the appellant. This transaction is void under the Money Lenders Act, 1900. (1) First, it is an agreement entered into by the plaintiffs in the course of their business as money lenders, with respect to the advance and repayment of money, otherwise than in their registered name. It is said that there is no offence unless the money lender is using another name as an alias with the object of concealing his identity, but the words of the Act are clear.

Secondly, we submit that the post-dated cheques were "a security for money" taken by the plaintiffs "otherwise than in their registered name." Bailhache J. held that they were only a method of repayment. It is submitted that he was wrong; the cheques were plainly "a security for money." With regard to the first point the language of the Act is wide

(1) The Money Lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2, sub-s. 1, provides: "A money lender as defined by this Act— . . . . (*c*) shall not enter into any agreement in the course of his business as a money lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money lender, otherwise than in his registered name."

enough to avoid the whole transaction. It is an agreement for the advance and repayment of money otherwise than in the registered name of the money lenders: *In re Robinson* (1); see also *In re Robinson's Settlement* (2) and *In re Robinson.* (3) The appellants' case is still stronger on the second limb of the sub-section. The taking of the cheques by the respondents was the taking of a "security for money" in the course of their business as money lenders "otherwise than in their registered name." In *Forster* v. *Mackreth* (4) Kelly C.B. said that "so far as regards its practical effect, a post-dated cheque is the same thing as a bill of exchange at so many days' date as intervene between the day of delivering the cheque and the date marked upon the cheque." Bills of exchange and cheques are "securities for money": *Barry* v. *Harding* (5); see also *Shaffer* v. *Sheffield* (6) and *Currie* v. *Misa.* (7) These cheques are "securities for money," and not being taken in the money lenders' registered name the transaction is void.

[Upon the meaning of the expression "security for money" they also referred to the Carriers Act, 1830 (11 Geo. 4 and 1 Will. 4, c. 68), s. 1; the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 12; Stroud's Judicial Dictionary, 2nd ed., p. 1817; and Chalmers on Bills of Exchange, 8th ed., 353.]

Clayton K.C. and *Wallington* for the respondents. The first question is whether the money lenders in this case entered into an agreement "otherwise than in their registered name." Their identity was fully disclosed, and the object of the Act in that respect was thoroughly attained: *Kirkwood* v. *Gadd.* (8) The respondents did not contract otherwise than in their registered name. The restriction does not extend to every stage and incident of a money-lending transaction. Next, we submit that the taking of the cheques did not constitute the taking of a "security for money" within the sub-section. "Security" means a security on

(1) (1911) 104 L. T. 712.
(2) [1912] 1 Ch. 717.
(3) [1910] 2 Ch. 571; [1911] 1 Ch. 230.
(4) (1867) L. R. 2 Ex. 163, 167.
(5) (1844) 1 J. & L. at 475, 483.
(6) [1914] 2 K. B. 1.
(7) (1875) L. R. 10 Ex. 153.
(8) [1910] A. C. 422.

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specific property, something over and above the personal obligation: *In re Rayner.* (1)

Macaskie in reply.

[LORD STERNDALE M.R. Suppose there was here the taking of a "security for money," but both parties intended only to use the cheques as a method of repayment.]

Nevertheless the transaction would be avoided by the Act. Every material step in the transaction must be taken in the money lender's registered name. Here an important part of the transaction constitutes an evasion of the Act. The transaction is therefore avoided.

LORD STERNDALE M.R. I have had some doubt about this case, but on the whole I think the appeal must be allowed. It is not necessary for me to say anything upon the point whether the respondent has entered into any agreement in the course of his business as a money lender with respect to the advance and repayment of money otherwise than in his registered name within s. 2, sub-s. 1 (*c*), of the Act, but as to the second part of the sub-section the question is whether he has taken "any security for money in the course of his business as a money lender otherwise than in his registered name." The transaction seems to have been a bona fide one, and I must say that the merits of the defence are not very conspicuous. The appellant was not deceived in any way, but that is not material. The question is, what is the meaning of the sub-section? [The Master of the Rolls read it and continued:] I cannot agree with what has been suggested that where a money lender has entered into an agreement with respect to the advance and repayment of money in his registered name, and, his name having been so disclosed, he may then take a security for money otherwise than in his registered name. I think the security must be taken in his registered name. Here in my opinion the transaction was bona fide, and the stipulation as to the cheques was for the convenience of the borrower, and possibly of the money lender also. The evidence shows that both parties looked upon

(1) [1904] 1 Ch. 176, 187, 189.

the giving of the post-dated cheques as a convenient method of repayment; neither of them thought they were giving or taking a security at all. But if these cheques were in fact "a security" undoubtedly the money lender took them. The question is were they securities for money? It seems to me, looking at the various Acts of Parliament in which cheques are referred to, and the expression "securities" is used, that they were. The meaning of the word "securities" is not confined to a document which gives a charge upon specific property. Undoubtedly the promissory note was a security for money and the cheques seem to me to stand upon the same footing. I think therefore that the money lender in this case did take a security for money in the course of his business as a money lender "otherwise than in his registered name," and that the appeal must be allowed.

ATKIN L.J. I agree. I also think that the defence in this case has no merits, but the Money Lenders Act was intended to be of general operation, and it would be wrong for us to cut down the provisions of that Act. I regard the words "security for money" as a generic term, having no special or exclusive reference to a document which gives a charge upon specific property. The word "security" is to be found in several recent Acts, such as the Forgery Act, 1913, s. 2, sub-s. 2 (*a*), and the Larceny Act, 1916, s. 17, and seems to be of general application, and I think these cheques were in fact "securities for money" given to persons other than the money lender. It is impossible to say that they were not taken in the ordinary course of the money lender's business as security for money, just as the promissory note itself was taken. They give to the payees a right to sue, and there are no days of grace. It is impossible to say that in taking them the money lender was not taking a security as part of the transaction. The intention of the Legislature in passing the Act was to protect not merely the borrower but the public also, such as bankers, etc., and we should not be justified in cutting down the meaning of its plain words, for to do so would often have the effect of defeating the intention of the

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Act. As to the first point I express no concluded opinion, but I have difficulty in seeing that an agreement to repay a loan by instalments of fixed amount is not an agreement with respect to the advance and repayment of money. The result is that the transaction must be treated as illegal and the appeal must be allowed.

YOUNGER L.J. I too cannot find any merits in this defence, but I think the appeal must succeed.

Upon the first point, as to taking repayment otherwise than in the registered name of the money lender, everybody will I think agree that this was an agreement made bona fide between the borrower and the lenders, neither of them contemplating that any other party should be interested in it. But if the cheques were actually taken in the names of two employees, that might certainly point to an agreement in respect to the repayment of money otherwise than in the money lender's registered name. I do not, however, desire to express any concluded opinion upon that aspect of the case, because I think the cheques were clearly "securities for money," and that they were taken otherwise than in the money lender's registered name. I think both the cheques and the promissory note were securities for money. The cheques, like the promissory note, were negotiable instruments, and they gave the money lender something by means of which he could recover his money, something in addition to that which was conferred upon him by the principal document, the promissory note itself.

The appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Guedalla, Jacobson & Spyer.*
Solicitors for respondent: *Isadore Goldman & Co.*

G. A. S.

[IN THE COURT OF APPEAL.]

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Dec. 13.

DAVEY *v.* ROBINSON.

[1922. D. 393.]

County Court—Jurisdiction—Remitted Action—Reduction of Claim for Damages —Alternative Claim for Injunction—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *ss.* 56, 65—*County Courts Act,* 1903 (3 *Edw.* 7, *c.* 42), *s.* 3—*County Courts Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 73), *ss.* 1, 2, 4, *sub-s.* 1.

Where an action, commenced in the High Court, has been transferred to a county court under s. 1 of the County Courts Act, 1919, the effect of s. 4 of that Act is to give the county court jurisdiction to deal with the matter equal to or the same as that of the High Court.

The plaintiff and defendant entered into an agreement, which provided that in the event of any breach thereof by the defendant he should pay to the plaintiff in respect of each such breach a sum of 150*l.* by way of agreed and liquidated damages. The plaintiff alleged that the defendant had broken the agreement, and he brought an action in the High Court claiming the sum of 150*l.* and an injunction. The plaintiff afterwards applied, under s. 1 of the County Courts Act, 1919, to have the action remitted to a county court, reducing the money claim to 90*l.* and claiming an injunction in the alternative. The Master made the order for remittal. The plaintiff then delivered particulars of claim, asking for 90*l.* damages or in the alternative an injunction. He admitted, however, that the real object of the action was to obtain an injunction. On the action coming on for trial the county court judge declined jurisdiction on the ground that in substance the action was for an injunction alone. On appeal to a Divisional Court that Court held that the county court judge had jurisdiction to entertain the action, and sent it back to him for trial:—

Held, by the Court of Appeal, that the decision of the Divisional Court was correct.

Appeal from the decision of a Divisional Court (Darling and Salter JJ.) reversing that of the judge of the Clerkenwell County Court.

The action was commenced in the High Court. The plaintiff claimed: (*a*) the sum of 150*l.* agreed damages for breach of a contract dated January 21, 1921; (*b*) an injunction to restrain the defendants their servants or agents from carrying on the business of electrical engineers, contractors and accessories dealers within seven miles of the premises numbered 377 New North Road, N.

By the above mentioned contract the defendants had sold

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to the plaintiff the business in question for 375*l.* and had agreed not to carry on a similar business within seven miles of the address where the defendants had carried on the business, and that for each breach of the said agreement they should pay to the plaintiff the sum of 150*l.* by way of agreed damages.

The plaintiff alleged that the defendants had broken the agreement not to carry on a similar business and he brought the action claiming the above mentioned relief. The plaintiff afterwards wishing to have the action tried in the county court reduced his claim for 150*l.* to 90*l.*, and applied under the County Courts Act, 1919, s. 1, sub-s. 1, to have the action remitted. Upon that application the Master made the following order: "Upon hearing the solicitors upon both sides, and the claim of the said plaintiff having been reduced to under 100*l.*, it is ordered that this action be transferred to a county court of Middlesex holden at Clerkenwell."

The action having been transferred accordingly the plaintiff delivered the following particulars of claim:—

1. The plaintiff claims the sum of 90*l.* damages for breach of an agreement made between the plaintiff and the defendants dated January 21, 1921, whereby the defendants agreed not to establish, carry on, or conduct, or be directly or indirectly concerned, interested, or employed in any capacity in the business of electrical engineers, contractors or accessories dealers, within seven miles of the premises 377 New North Road, N., so long as the plaintiff shall occupy the said premises.

2. The defendants in breach of the said agreement are carrying on or are interested in the business of electrical engineers, contractors and accessories dealers at 61 Holloway Road, and they have carried out the work of electrical engineers and contractors at other places within seven miles of 377 New North Road aforesaid.

3. In the alternative, the plaintiff's claim is for an injunction to restrain the defendants, their servants or agents from carrying on the business of electrical engineers,

contractors and accessories dealers within seven miles of the premises 377 New North Road, N., in breach of the said agreement.

The plaintiff claims (*a*) 90*l.*, (*b*) in the alternative, if the said damages are not paid, an injunction.

In the county court counsel for the plaintiff admitted that the real object of the action was to obtain an injunction, but did not abandon his claim for damages.

Counsel for the defendants submitted that the Court had no jurisdiction to try the case, as the action was substantially one for an injunction, and the claim for 90*l.* damages was inadmissible, because the parties had fixed the liquidated damages for each and every breach at 150*l.*, which was an amount outside the jurisdiction of the Court. He relied upon *Stiles* v. *Ecclestone.* (1)

In reply it was submitted that the action having been remitted the Court had full jurisdiction to try it.

The county court judge held that he had no jurisdiction to try the action and gave judgment for the defendants. It could not be said that the claim for damages must necessarily have been within the jurisdiction in point of amount, even though the claim on paper was for 90*l.* There was therefore no jurisdiction to grant the ancillary relief claimed. In substance the action was for an injunction alone. The mere fact that the action had been remitted did not give the county court jurisdiction to try it.

The plaintiff appealed to the Divisional Court for an order that the judgment be set aside and that a new trial be had between the parties on the grounds that the county court judge was wrong (1.) in holding that he had no jurisdiction, and (2.) in declining to try the case which had been remitted to him from the High Court.

The Divisional Court (Darling and Salter JJ.) reversed the decision of the county court judge. They held that he was wrong in law in holding that he had no jurisdiction to try the action, and sent it back to him for trial.

The defendants appealed.

(1) [1903] 1 K. B. 544.

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P. Quass for the appellants. The county court judge rightly held that he had no jurisdiction to entertain this action. There was no valid money claim and there was therefore no jurisdiction to grant an injunction: *Rex* v. *Cheshire County Court Judge.* (1) I ask that the action may be struck out with costs under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 114.

The action is now different from that which was remitted. The 150*l.* claimed by the writ was in the nature of a penalty and not liquidated damages.

[YOUNGER L.J. referred to *National Provincial Bank of England* v. *Marshall.* (2)]

Sect. 4, sub-s. 1, of the County Courts Act, 1919 (9 & 10 Geo. 5, c. 73), is relied upon against the appellants' contention, but the action in its present form is not that which was transferred.

[ATKIN L.J. When once the action is remitted the county court has full jurisdiction.]

In *Stiles* v. *Eccleston* (3) Lord Alverstone said: "If parties have so bound themselves by a contract that in the event of a breach the remedy by way of damages must of necessity be by a claim for an amount in excess of the county court jurisdiction, then the case cannot be brought within the jurisdiction of the county court merely because an injunction only is claimed." Here it is admitted that the only object of the action is to obtain an injunction. "A plaintiff cannot make a claim in a county court for an injunction unless he proves that he is entitled to payment of a debt or damages or a demand in the nature of a debt and that the amount of the debt or damages is within the county court limit": per Lush J. in *Simpson* v. *Crowle.* (4) To hold that the county court judge has jurisdiction here would be practically to give him unlimited jurisdiction. It is said that the mere fact of a remitter confers jurisdiction upon the county court. It is submitted that that is wrong.

Again the plaintiff's proper remedy was by way of

(1) [1921] 2 K. B. 694.
(2) (1888) 40 Ch. D. 112.
(3) [1903] 1 K. B. 545.
(4) [1921] 3 K. B. 243, 254.

prohibition or mandamus. Where the county court declines jurisdiction there is no right of appeal to the Divisional Court: *Rex* v. *Mellor* (1); *Barker* v. *Palmer*. (2)

[LORD STERNDALE M.R. referred to s. 120 of the County Courts Act, 1888.]

[ATKIN L.J. referred to *Smythe* v. *Wiles*. (3)]

Serjt. Sullivan K.C. and *Martin O'Connor* for the respondent. The earlier cases are superseded by s. 1 of the Act of 1919.

[LORD STERNDALE M.R. referred to the Annual Practice, p. 2221; note as to the effect of the section.]

In *Dierken* v. *Philpot* (4) the order for remittal was not appealed against and prohibition was refused.

We rely upon s. 4 of the Act of 1919, which provides that where an action has been transferred to the county court that Court shall have jurisdiction to deal with the same, "any enactment to the contrary notwithstanding." When once the action has been remitted the only remedy is by way of appeal. The action as remitted was a claim for 90*l.* or in the alternative for an injunction. The plaintiff could not get both, but there was jurisdiction in the county court to grant an injunction. Sect. 4 of the Act of 1919 covers everything.

[YOUNGER L.J. referred to *Spring* v. *Fernandez*. (5)]

Quass in reply.

LORD STERNDALE M.R. This is an appeal from the decision of a Divisional Court, which reversed the decision of a county court judge sitting at Clerkenwell. I have a little difficulty in seeing exactly what the learned county court judge did, whether he refused jurisdiction to hear the action, or whether he gave judgment against the plaintiff because he did not consider that he had jurisdiction to grant a portion of the relief claimed. But the case has been treated as if he had refused jurisdiction; and, looking to the opening words of his judgment, I think we must assume that that was so, because he says: "The question which I have to decide is whether

(1) [1914] 2 K. B. 588.
(2) (1881) 8 Q. B. D. 9.
(3) [1921] 2 K. B. 66, 83.
(4) [1901] 2 K. B. 380.
(5) [1912] 1 K. B. 294.

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this action is within the jurisdiction of a county court." That means, I think, whether he had jurisdiction to entertain it. [The Master of the Rolls stated the facts and continued:] It was suggested that all that was transferred to the county court was the action so far as it claimed 90*l.* To my mind that is quite wrong. The order of remittal transferred the whole of the action—the whole of the claim in the action.

I think there was jurisdiction to do that, because the requirement of s. 1 is only that the amount remaining in dispute does not exceed 100*l.*, and there was no other amount remaining in dispute after the money claim had been reduced to 90*l.* But I wish to say that where there appears upon the writ some other relief claimed besides the money relief—in this case an injunction—I think that is a matter which should be taken into account by the Master in considering whether he shall order the action to be transferred or not; and if there be a claim for some other relief which may raise such questions as have been raised here as to the jurisdiction of the county court to entertain the claim for other relief, then that may be a reason why the action should not be transferred. I strongly suspect that in this case none of those considerations were brought before the Master at all, and therefore he had not the opportunity of considering them. Consequently I say nothing as to whether his order was right or wrong as a matter of discretion. He had jurisdiction to make it and he made it; it was not appealed against, and the action was transferred. Particulars of claim were then delivered by the plaintiff. He thereby claimed the sum of 90*l.* damages, and in the alternative an injunction. It is said that having regard to those particulars this was not the same action which was transferred. It seems to me that it was. As counsel for the respondent says, "If it was not the old action, where had that action gone? It had not gone out of existence. It had gone from the High Court and been transferred to the county court." It was the same action. But it may be that it was the wrong claim to make in that same action, and one reason why it was said it was not the same action was that, if the writ in the

first instance had claimed the injunction in the alternative, then the action could not have been remitted. I am not at all satisfied that that was the case, but I will assume that it was so. That being so it was said that it was wrong to amend the claim in such a way that if it had been the original claim the action could not properly have been remitted. But in *Spring* v. *Fernandez* (1) it was decided by a Divisional Court (consisting of Lord Sumner and Bankes L.J., when they were judges of first instance) that an amendment can be made after the action has been remitted, although it raises a case which, if it had been upon the writ or the claim in the first instance, would have prevented the action from being remitted. That, I think, is right. Therefore that point fails. But it must be remembered that, at the time when that judgment was given, the action could only proceed, after being transferred to the county court, within the jurisdiction of the county court. That is to say, if the amendment raised a case which was not within the jurisdiction of a county court at all, such as an action for breach of promise of marriage, then the amendment could not be made. The reason of that was that it had been decided in *Curtis* v. *Stovin* (2) that the words in the old section (51 & 52 Vict. c. 43, s. 65), which were "tried in any Court in which the action might have been commenced," meant a county court which had jurisdiction to try that particular action. Those words however are not found in the new Act (9 & 10 Geo. 5, c. 73, s. 1), which substitutes for them, "whether the action could or could not have been commenced in the county court." Those words remove the only restriction as to amendment which was thought to exist by the learned judges who decided *Spring* v. *Fernandez*. (1) Therefore I think there is nothing wrong in the amendment. But then there arises another question. Had the learned county court judge jurisdiction to deal with the alternative claim for an injunction when he came to the conclusion, or it was suggested to him, that there was no real claim for damages at all? This Court has decided in *Rex* v. *Parsons* (3) that in an action commenced

(1) [1912] 1 K. B. 294. (2) (1889) 22 Q. B. D. 513.
(3) (1921) 37 Times L. R. 546.

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in the county court an injunction cannot be granted in respect of a cause of action for which damages cannot be recovered, because an injunction is ancillary to the claim for damages and cannot be granted as a substantive form of relief by itself. What we have to deal with here is this: does that apply to a remitted action? In my opinion it does not, because s. 4 of the Act of 1919 contains very comprehensive provisions which give the county court judge jurisdiction to deal with the matter. I am not suggesting for a moment how he ought to deal with it. The words are these: (1) "Where under any of the provisions of the principal Act or of this Act, an action or counterclaim or matter is ordered to be transferred from the High Court to the County Court, any party may lodge" certain documents, and so on, and on their being so lodged "the action and counterclaim (if any), or the counterclaim or matter, shall be transferred to the said County Court, and, subject to County Court rules, all further proceedings therein shall be taken and tried as if the action, counterclaim, or matter had been originally commenced in that County Court"—now come the important words—"And the County Court shall have jurisdiction to deal with the same, any enactment to the contrary notwithstanding." I do not think the wording is as clear as it might be. It would have put the matter beyond the shadow of a doubt if the section had said: "The County Court shall have jurisdiction to deal with the same equal to or the same as that of the High Court." But unless that is the meaning of those words I fail to see any reasonable meaning that can be attached to them; and I think they mean that the county court shall have jurisdiction to deal with the matter, notwithstanding the fact that its original jurisdiction may be limited by statute, so that it would not have original jurisdiction to deal with the same. Unless it means that, I do not know what it means.

Therefore I think, this being a remitted action, to which totally different considerations apply from those which apply to an original action, the county court judge had jurisdiction to deal with it, and he ought to deal with it. As to the merits

(1) 9 & 10 Geo. 5, c. 73, s. 4, sub-s. 1.

of the case I express no opinion, and I do not wish to intimate any opinion as to what I think the county court judge's decision ought to be. That is a matter entirely for him. I think he had jurisdiction to deal with the action, and he was wrong in refusing to do so. Therefore the decision of the Divisional Court should be affirmed and the appeal dismissed with costs.

ATKIN L.J. I agree. I think it important to make it clear that there are not the restrictions upon the power to remit, and upon the powers of a county court judge in a remitted action, that have been suggested here by the appellant, because I think it is very important that this power, which has been very largely extended by recent legislation, should not be cut down by the Courts unless it is necessary to do so in order to carry out the provisions of the statute. In the first place it appears to me that there was on the writ as framed power to remit this action. The claim was for a sum of 150*l.* as liquidated damages and for an injunction. Assume that the claim on the writ asked for both, then I think that when the claim for 150*l.* liquidated damages was cut down to a claim for 90*l.* for liquidated damages the case came within s. 1 of the Act of 1919, so that there was power to remit. I also think, though it is not necessary to decide it, that even if the claim had been for 90*l.* liquidated damages or in the alternative an injunction, there was power to remit, because I think it would still be an action based on contract in which the claim was reduced to less than 100*l.* And whether or not the county court would have been right in granting an injunction, if it were eventually asked for by itself, seems to me to be irrelevant to the right to remit, though it might have been relevant to the exercise of the discretion in remitting.

I do not intend in this case to discuss the question whether this is such a case that the plaintiff could not recover both the liquidated damages as damages for one breach of the contract and an injunction to restrain future and different breaches of the contract. It is not necessary to determine

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that, because Serjeant Sullivan in this case has made it plain that he treats the so-called claim for liquidated damages as being in fact a penalty. Then arose the question of the amendment that was made before the case came before the learned county court judge. The amendment was made in the particulars of claim which under the rules have to be delivered to the defendant in a remitted action, but there the claim was put—I think somewhat inartificially—as a claim for unliquidated damages and a claim in the alternative for an injunction. But the claim was said to be in the alternative for an injunction in case the damages were not paid, which is a form of relief which seems more to spring from that which is given in criminal Courts than in civil Courts. However, that is the claim as formulated; and to that the defendant pleaded, as he was bound to do upon a notice, under the rules, given to him by the plaintiff.

Then the case came before the learned county court judge. It is not disputed by Mr. Quass, quite properly I think, that if the claim made before the learned judge was a claim for unliquidated damages and for an injunction, the learned judge would have had the power both to award damages and to grant an injunction. But it is said because the claim was a claim for unliquidated damages or an injunction that the county court judge had no power to do that, because he could not have granted an injunction if the action had been commenced for an injunction alone. I think that view was taken by the learned judge, but I do not think, with great respect, that that is correct.

Rex v. *Cheshire County Court Judge* (1) does not seem to me to decide that at all. It is limited to a case where in an action commenced in a county court there is no money claim at all, and possibly, as suggested by the Master of the Rolls, a case where there could be no money claim. This is a case where there is a money claim and also a claim for an injunction. But, quite apart from his power, if the action had been commenced in the county court I agree with the Master of the Rolls that the words of s. 4, which provide

(1) [1921] 2 K. B. 694.

that the county court judge shall have jurisdiction to deal with the same—which I think means the proceedings in the action—"any enactment to the contrary notwithstanding," are intended to give affirmatively an extended jurisdiction to the county court. It is impossible it could be otherwise, because that section refers to cases which are sent to the county court both under s. 1, dealing with actions of contract and tort where the money claim is less than 100*l.*, and also to cases sent to the county court under s. 2, where an action of tort can be sent if the plaintiff has no visible means of paying costs. In that latter class of case are included actions which would not be within the original jurisdiction, the statutory jurisdiction, of the county court at all; such as actions of seduction, actions of libel and slander, and actions relating to hereditaments and anything relating to tolls and franchise.

All those actions may be sent down to the county court, and if they are sent down then the county court has jurisdiction to deal with them; and it would be a strange matter, in my opinion, if, while extended jurisdiction is expressly given to the county court to deal with the matter, the county court is limited in the relief that it can give. To my mind it was intended that it should be able to give the full relief that the plaintiff would have been able to get in the High Court.

For these reasons it appears to me that the learned county court judge ought to have heard the case. What he will do with it when he does deal with it I have no idea; I express no opinion on the merits of the case; but it seems to me he has jurisdiction to deal with the matter; and I cannot help thinking that, as the case is to go back, the parties will be well advised, before it comes before the learned county court judge anew, to take proceedings by way of amendment in order to make quite clear what is the case they now raise.

I wish to say only one other thing on the contention which was put forward by Mr. Quass—namely, that here there was no right of appeal to the Divisional Court, because it was a

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case where the judge had declined jurisdiction. I wish to say that I am quite satisfied that both in cases where the complaint is that the judge has declined jurisdiction and in cases where the complaint is that he has acted in excess of jurisdiction, there is a concurrent remedy by way of appeal as well as by either a writ of prohibition or a writ of mandamus. I cannot help thinking the existence of the right of appeal might be a circumstance which might cause a Court asked to issue a writ of prohibition to hesitate on the ground that there was another and convenient remedy. For these reasons it appears to me that the judgment of the Divisional Court was quite right and that this appeal should be dismissed with costs.

YOUNGER L.J. I am of the same opinion. In my judgment this action when it was remitted to the county court was an action which, upon the true construction of s. 1 of the County Courts Act of 1919, it was fully within the power of the Master to remit.

The action as it then stood was one for 150*l.*, in respect of what is described in the writ as "agreed damages" for breach of contract, with, as ancillary and supplemental thereto, an injunction to restrain the defendants from further committing the breaches of that contract which had sounded in damages in respect of past breaches in that agreed sum. Upon the plaintiff submitting, as he did, to reduce the sum of 150*l.* to 90*l.*, that action was plainly in my view within the express terms of s. 1 of the County Courts Act, 1919. The difficulty in the case does not begin at that point; it begins later, when the plaintiff making, perhaps, more careful inspection of the agreement in respect of which he was suing, ascertained that, upon its true construction, the payment of the 150*l.* which he was claiming would deprive him of any right to an injunction in respect of the past breaches, that in fact the agreement was one under which he might elect whether he would have his agreed damages or an injunction, but it was not one under which he was entitled to both. In other words, the agreement was one which is described by Wright J. in

General Accident Insurance Corporation v. *Noll* (1), which followed on the decision of the Court of Appeal in the *National and Provincial Bank of England* v. *Marshall* (2), the locus classicus with respect to an agreement of this sort. The plaintiff has an option to elect between two forms of relief, but he cannot have both. If he elects to take liquidated damages there is no room for an injunction: the 90*l.* damages is all he is entitled to. But if, on the other hand, he elects, as he does here, to take an injunction, he may have it, but he cannot have judgment for 90*l.* liquidated damages as well. That would to my mind plainly have been the position of the plaintiff if, as he in the county court was preparing to contend, his 150*l.* (or 90*l.* as it had become) was what he called "agreed damages." But he has come to the conclusion, and I think rightly, that there are no damages at all; and accordingly, so far as this agreement is concerned, there is no right to anything except an injunction, unless peradventure he makes a substantive claim for unliquidated damages, in which case he might be entitled to both. But as the claim was made in the county court it was based on the alternative right, a right to agreed damages of 90*l.* or an injunction; and that injunction which he asked for in the county court was, I think, something to which if he was entitled at all he was entitled independently of any demand for damages; and, accordingly, that was a form of relief which it would not have been competent for the county court to grant in any such action or proceeding commenced in that Court.

The question, therefore, is—and it is not a simple one—whether if the plaintiff's claim on the writ had been indorsed in the manner in which it was set forth in the county court, it would have been competent for the Master to remit the action as it then stood? Although it may not be strictly necessary to decide that question, my own opinion is that it would not have been competent for the Master to remit the action in that form, because I think that if the injunction which is asked for is a substantive and independent form of

(1) [1902] 1 K. B. 377. (2) 40 Ch. D. 112.

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relief, depending in no way upon any other relief asked in the action and in no way ancillary or complementary thereto, then the action is one which the section does not empower the Master to remit to a county court for trial, because it is one which the county court itself has no jurisdiction to deal with.

But that is not the whole matter here. When an action has once been remitted to the county court, then I agree that the powers of the county court over that action when it is so remitted are very much greater by virtue of s. 4 of the Act of 1919 than would have been those powers if the action had been commenced in the county court. And, indeed, although the matter is not free from difficulty, I have come to the conclusion that the powers of the county court go so far as to enable the judge, if application be made to him, to permit in the remitted action an amendment which would raise a case that could not have been the subject of original proceedings in the county court. I think that the case before Hamilton and Bankes JJ., to which my Lord has referred, when taken in connection with the extended terms of s. 1 of the Act of 1919, leads to that result.

But I wish to add—and this point I think seems to have been overlooked—that if an application to amend is made to the county court on the remittal, which involves the inclusion thereafter in that proceeding of a claim which is not within the original competence of the county court, then the county court judge must exercise his discretion with the greatest possible care, so as not to allow, by such a side wind, the assumption by the Court of power to deal with matters which it is not competent to entertain under its original jurisdiction.

I have said enough to show that this action having been properly remitted to the county court judge, it was within the competence of the judge to permit such an amendment as, without any application made, is I think embodied in the particulars of claim made in the county court. It cannot therefore be said that he had no jurisdiction to deal with the case as presented to him at the trial, or that he was right in refusing to deal with it at all.

Accordingly I think that the order of the Divisional Court was right, and that the action should be sent back to the county court judge to be dealt with by him.

Appeal dismissed.

Solicitors for appellants: *H. W. Henniker Rance & Co.*
Solicitors for respondent: *Edmond O'Connor & Co.*

G. A. S.

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[1922. H. 847.]

Principal and Agent—Pretended Agent—Entrustment to of Motor Car for Sale to non-existent Person—Larceny by a Trick—Sale without Authority—Action against Buyer for return of Car—Defences—Estoppel of Owner from denying Agent's Authority to sell—Sale by "mercantile agent" in ordinary Course of Business—Absence of Notice of Agent's want of Authority—Burden of Proof—Factors Act, 1889 (52 *&* 53 *Vict. c.* 45), *s.* 2—*Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 21.

The plaintiff, desiring to sell his motor car for 210*l.*, and being informed by N. that he had a friend, H., who would probably buy it for that price, allowed N. to have possession of the car for the sole purpose of showing it and endeavouring to sell it to H. There was no such person as H., and N. represented that there was with the intention of obtaining the car for his own benefit. N. afterwards through an intermediary sold the car to the defendants for 110*l.* Before N. got possession of the car he had been convicted of theft and other offences, but that was not known to any of the parties. While N. was in possession of the car he obtained an appointment as car salesman to a firm of motor engineers. In an action by the plaintiff against the defendants for the return of the car or its value and damages for its detention;—

Held, that N. had obtained the car from the plaintiff by larceny by a trick, the plaintiff never having given any real consent to his having or passing the property therein, and that the plaintiff should succeed in the action unless the defendants had some valid defence thereto.

Folkes v. *King*, ante, p. 282, considered and distinguished.

Held, further (1.) that the defendants could not set up the defence that under the Sale of Goods Act, 1893, s. 21, sub-s. 1, they had acquired a better title to the car than the seller had, inasmuch as, under that sub-section, the plaintiff was not by his conduct precluded from denying the seller's authority to sell the car; (2.) that the defendants could not rely upon the defence that under the Factors Act, 1889, s. 2, sub-s. 1, the sale to them was as valid as if the seller had been expressly authorized by the plaintiff to make the same, inasmuch as N. was not a "mercantile

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agent," and, if he was, the sale by him was not a sale in the ordinary course of his business as a mercantile agent, within the meaning of that sub-section; and, further, because the defendants had failed to satisfy the proviso to that sub-section by showing that they had not at the time of the disposition notice that N. had not authority to sell the car; and that the defendants had no defence to the action.

Under the Factors Act, 1889, s. 2, sub-s. 1, proviso, the onus is on the person taking under the disposition of the goods made by the mercantile agent of proving that he acted in good faith and without notice of the agent's want of authority, and is not upon the person whose goods have been disposed of by the agent of proving the contrary.

Whitehorn Brothers v. *Davison* [1911] 1 K. B. 463 distinguished.

Negligence on the part of an owner of goods, which have been sold without his authority or consent, in order to constitute conduct precluding him from denying the seller's authority to sell, within the meaning of the Sale of Goods Act, 1893, s. 21, sub-s. 1, must be more than mere carelessness in the management of his own affairs and must amount to a disregard of his obligations towards the buyer.

ACTION tried by Lush J. without a jury.

The plaintiff, Mr. Roger Alexander Bryce Heap, was a motor engineer carrying on business in London in partnership with a Mr. Horgan, who resided in Ireland. The latter was the owner of a Citroen motor car, being a 1920 car of ten horse-power left-hand steered with a four-seater body. He entrusted the car to the plaintiff for sale in England, and for the purposes of the present case the plaintiff was treated by both parties as being the owner of the car, which he believed was worth 210*l.* In October, 1921, a man, who described himself as Captain the Hon. Roger North, made the acquaintance of the plaintiff, and learned that he had the car and was desirous of selling it. North was not and did not pretend to be a dealer in motor cars, but he represented to the plaintiff that he had a friend, a Mr. Hargreaves, of Uxbridge, who he thought would buy the car for 210*l.* On October 28, 1921, the plaintiff allowed North to have possession of the car for the sole purpose of driving it to Uxbridge, showing it to Hargreaves, and if possible selling it to him for 210*l.* On the same day North came back to the plaintiff and told him that Hargreaves had bought the car for 210*l.*, that Hargreaves was a rich man and would pay for the car, that he was going for a short holiday and would pay for the car when he returned, and that Hargreaves had consented

that during his absence North should have possession of the car for his own use. North then used the car and drove it about to the knowledge of the plaintiff. After a time the plaintiff, not having been paid for the car, asked North the reason for the delay, and North replied that Hargreaves was so rich that he did not like to trouble him about so small a sum as 210*l.*, but that payment would be made soon. North afterwards told the plaintiff that Hargreaves was going to lunch with him and that he was bringing his cheque and would like to have the registration book showing the ownership of the car. The plaintiff thereupon handed the registration book to North to give to Hargreaves, but without signing his name in it. The plaintiff never received payment for the car from Hargreaves or North or at all, and he never saw the registration book again nor apparently did anybody else. North having obtained the car drove it to the premises of a firm of motor engineers, who appointed him to be their agent for the sale of their cars. While so employed North became acquainted with a man named Cory. North, thinking apparently that the defendants, the Motorists' Advisory Agency, Ld., might buy the car in question, moved Cory to approach the defendants and to tell them that the Hon. Captain Roger North had the car for sale at the very low price of 110*l.* Cory asked the defendants to buy the car.

On December 1, 1921, the defendants, whose general manager Mr. Wilfred Morgan acted in the matter as their agent, bought the car through Cory for 110*l.*, payment being made by a cheque of that date payable to Cory and signed on behalf of the defendants by their said manager and their secretary, and a receipt of the same date being given by Cory to the defendants.

The whole story told by North to the plaintiffs was a fiction, there being no man of the name of Hargreaves such as North had described, and no person of that name having ever agreed or negotiated with North for the purchase of the car. North had in and between 1914 and 1919 been convicted of five separate offences, and (inter alia) in October, 1915, of

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stealing a motor car, but these facts were unknown to the plaintiff or the defendants, or any of the other persons above mentioned, until after the defendants had bought the car.

On February 24, 1922, the plaintiff, having found out that the car was in the possession of the defendants, brought the present action against them. He alleged in his statement of claim (para. 1) that he was at all material times entitled to the possession of the car; (para. 2) that on January 19, 1922, the defendants were in possession of the car and the plaintiff demanded its return, but defendants refused to deliver it up to the plaintiffs and thereby converted it to their own use and wrongfully deprived the plaintiff of it; (para. 3) that alternatively the defendants had detained and still detained the car from the plaintiff; and (para. 4) that the plaintiff had suffered damage; and the plaintiff claimed (*a*) the return of the car or its value—namely, 210*l.*; (*b*) damages for wrongfully depriving the plaintiff of the car; and (*c*) damages for the wrongful detention of the car.

The defendants in their defence stated (para. 2) that they denied that they had been guilty of conversion of the car or of wrongfully depriving the plaintiff of the same or that they had wrongfully detained the car as alleged or at all; (para. 3) that about the end of 1921 North as agent for the plaintiff and with his authority was endeavouring to sell the car; that the defendants by their general manager, Morgan, through Cory purchased the car for 110*l.*; and that it was not worth 210*l.* as alleged; and (para. 4) that the defendants purchased the car in good faith and without notice of any absence or want of authority, and that they would rely upon s. 2 of the Factors Act, 1889 (1), and s. 21 of the Sale of Goods Act, 1893. (2)

(1) Factors Act, 1889, s. 2:

"(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the

In particulars of their defence given at the request of the plaintiff, the defendants further stated (under para. 3 of the defence) that the car was purchased on December 1, 1921; that indirectly it was sold by North to the defendants, but the defendants actually purchased it from Cory from whom they took delivery and to whom they paid the purchase price of 110*l.*, Cory being the direct purchaser from North for 100*l.*; and (under para. 4) that North was at the time of the sale in possession of the car with the knowledge and consent of the plaintiff and for the purpose of selling it, and had been driving the car about some two or three weeks before the actual sale thereof; and that the plaintiff knew or ought to have known that North was then acting as an agent for the sale of the car.

On May 20, 1922, while the action was pending, North was again convicted for having stolen a motor car on March 24, 1922, and was sentenced to three years' penal servitude, as was admitted by both sides.

On December 14 and 15 the action was tried by Lush J., when evidence was called on both sides and all the above-mentioned facts in so far as they were not already admitted were found by his Lordship to have been proved.

Evidence was also called on behalf of the plaintiff to show that when the car was entrusted to North it was worth 265*l.*; and on behalf of the defendants to the effect that at the time when they bought the car it required repairs to put it into

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person making the disposition has not authority to make the same.

"(4.) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary."

(2) Sale of Goods Act, 1893, s. 21: "(1.) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

"(2.) Provided also that nothing in this Act shall affect—(*a.*) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof; (*b.*) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction."

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thoroughly good condition which would have cost about 60*l.*, and that in all the circumstances 110*l.* was a fair price for the defendants to have paid for the car.

Wilfrid Lewis for the plaintiff.

Gerald Dodson for the defendants.

The arguments of counsel appear from the judgment. In addition to the cases cited in the judgment, the following authorities were referred to: *Edmunds* v. *Bushell* (1); *Oppenheimer* v. *Attenborough & Son* (2); *Weiner* v. *Harris* (3); *Rimmer* v. *Webster* (4); *Weiner* v. *Gill* (5); *Cundy* v. *Lindsay* (6); *Hardman* v. *Booth* (7); *Phillips* v. *Brooks* (8); and Chalmers on Sale of Goods, 9th ed., p. 160, note as to the meaning of "notice" in s. 2, sub-s. 1, of the Factors Act, 1889.

LUSH J. This is an interesting case and it raises some important questions. It has been well argued by counsel on both sides. The facts are shortly these: [His Lordship stated the facts and continued:]

The plaintiff afterwards ascertained that the motor car was in the hands of the defendants and he ultimately brought this action to recover it, his case being that the possession of the car was obtained from him by North in circumstances which amounted to larceny by a trick, so that the property in the car did not pass to North, or to the defendants. If the car was obtained from the plaintiff by North in circumstances which amounted to larceny by a trick, the plaintiff's claim would be well founded and the defendants would be bound to deliver up the car, unless they could bring themselves within some statutory provision which enabled them to retain possession of it.

The first question which I have to decide is whether or not the car was obtained by North in circumstances which

(1) (1865) L. R. 1 Q. B. 97.
(2) [1908] 1 K. B. 221, 226.
(3) [1910] 1 K. B. 285; 15 Com. Cas. 39.
(4) [1902] 2 Ch. 163, 172.
(5) [1906] 2 K. B. 574.
(6) (1878) 3 App. Cas. 459.
(7) (1863) 1 H. & C. 803.
(8) [1919] 2 K. B. 243.

amounted to larceny by a trick. The difference between larceny by a trick and obtaining goods by false pretences may be shortly stated. Simple larceny is the felonious taking of goods belonging to another person against the will and without the consent of that person. In the case of larceny by a trick the person who has lost the goods has given an apparent consent to the possession being taken by the thief, and, therefore, it is not in one sense a case of obtaining goods without the consent and against the will of the owner; but, as the consent of the person who parts with the goods has been obtained fraudulently by a trick, it is only an apparent and not a real consent, and the person who has obtained the goods cannot set up that the owner has consented to his obtaining possession. The case of larceny by a trick therefore falls into line with the case of ordinary larceny. In the one case, as in the other, the thief has animo furandi deprived the owner of his goods without his consent; and, consequently, if the thief hands the goods on to another person, he confers no title to them upon that person. The case of obtaining goods by false pretences is the converse of that just mentioned. There the person who parts with the goods intends to pass the property in them and the person who obtains them by false pretences can convey a good title to them to some third person.

Into which of these two classes of cases does the present case fall? It is said by counsel for the defendants that it is a case of obtaining a car by false pretences, and not by larceny by a trick. In order to make that out he has to establish that the plaintiff intended to part with the property in the car to North. If he can establish that then he is right, but if he cannot he is wrong. Apart from authority I should have held that this was a case of larceny by a trick and that the plaintiff only intended to part with the possession of the car to North. The person for whom North pretended to obtain it did not exist. On behalf of the defendants, however, reliance is placed upon the recent case of *Folkes* v. *King* (1) in the Court of Appeal. At first sight,

(1) 39 Times L. R. 77. See now ante, p. 282.

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no doubt, the facts of that case would appear to be similar to those of the present case. The plaintiff there arranged with a man named Hudson, who was a dealer in motor cars, that Hudson should sell the plaintiff's car at a price which was not to be less than a certain figure without the plaintiff's permission. The car was accordingly delivered to Hudson, but he took it not with the intention of carrying out the arrangement but of defrauding the plaintiff, and in pursuance of that object he sold the car for his own benefit for less than the stipulated sum to a purchaser who sold it to the defendant. The plaintiff brought an action for the recovery of the car. The defendant's plea was that the car had been sold to his predecessor in title by a mercantile agent who was in possession of it with the consent of the owner, and that therefore under s. 2 of the Factors Act, 1889 (1), the plaintiff could not recover. [His Lordship read sub-s. 1 of that section, and continued :] It was essential therefore in the case of *Folkes* v. *King* (2) to ascertain whether or not the car had been handed over to a mercantile agent with the consent of the owner. Greer J. held that inasmuch as the plaintiff only parted with the possession of the car on the terms that it was not to be sold below a certain sum and Hudson, while apparently taking possession of it on these terms, intended when he took it to sell it for less and cheat the owner, the case was one of larceny by a trick. His view was that the plaintiff did not intend to part with the property in the car and did not really consent to Hudson having it, his apparent consent having been obtained by means of a trick. The Court of Appeal reversed that judgment and held that the case was not one of larceny by a trick. As I understand it, their judgment proceeded upon the ground that inasmuch as the plaintiff there intended to confer a power on Hudson to pass the property, it could not be said that he did not intend to pass the property. The Court held that if the owner of a chattel delivers it to A. for the purpose of enabling A. to pass the property to a purchaser, the owner,

(1) See note (1) ante, p. 580.
(2) 39 Times L. R. 77. See now ante, p. 282.

having conferred that power upon A., did intend to pass the property in the chattel just as much as if he had intended himself to pass the property to the person who bought the car from A. I need not cite passages from the judgments in that case. Bankes L.J. compared the case to that of *Oppenheimer* v. *Frazer* (1), where the goods were sold on approval. The case of *Folkes* v. *King* (2) is, therefore, an authority for this proposition, that if the owner of a chattel delivers it to a person with the intention that that person shall find a purchaser and pass the property to that purchaser, he passes the property in the chattel, and it is wrong to treat the case as a case of larceny by a trick. Are the facts in this case similar to those in that case? In my opinion they are not. There is, I think, an essential distinction between the two cases. In the present case in my view of the facts the plaintiff never did intend either that North should himself have the property in the car, or that he should pass the property in it to any real person as would have been the case if he had instructed North to find a purchaser for the car. What he did intend was that North should have possession of the car in order to take it and show it to a person who in fact had no existence—namely, the alleged Hargreaves. There was no Hargreaves. The whole story relating to him was an invention, and the whole scheme a fraud. It is not true to say that the plaintiff intended that North should pass the property to anybody. If he had known that there was no Hargreaves the car would not have gone out of his possession. He did not instruct North to find somebody to buy the car and take delivery of it from North. The whole transaction was in my opinion just as much a nullity as it would have been if North had induced the plaintiff to give him the car by pretending to be somebody who in fact he was not. In *Whitehorn Brothers* v. *Davison* (3) Buckley L.J. dealt with an analogous case and considered whether it ought to be treated as a case of larceny by a trick in which the property does not pass, or of obtaining by false pretences in which

(1) [1907] 2 K. B. 50.
(2) 39 Times L. R. 77. See now ante, p. 282.
(3) [1911] 1 K. B. 463.

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it does. He said (1): "I think there is larceny by a trick where the owner of goods, being induced thereto by a trick, voluntarily parts with the possession of the goods, but does not intend to pass the property in them, and the recipient has the animus furandi; and the same is true where the owner of the goods does not intend to pass the property in them to the particular person with whom he is dealing, and has been deceived by that person as regards the identity of the person with whom he is dealing." That principle is just as applicable to a case like this where the man Hargreaves, who was the only person with whom the plaintiff thought he was dealing, did not exist at all, as to the case put by Buckley L.J. The whole story about Hargreaves was false and there was no such person, and therefore there was no intention on the part of the plaintiff to pass the property to anybody. That being so, I do not think that the case of *Folkes* v. *King* (2) assists me, or in any way governs this case. There being no authority fettering my decision, I think the true view to take in this case is that North obtained possession of this car by a trick, animo furandi, that the property never passed to him, and that he never had the right conferred upon him to pass the property to anybody else.

It follows that the plaintiff should succeed unless the defendants can bring themselves within some statutory provision giving them a defence to the action. I will deal with the defences in order.

It was said first that s. 21, sub-s. 1, of the Sale of Goods Act, 1893 (3), afforded a defence. That sub-section provides that where goods are sold by a person who is not the owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title than the seller had "unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell." The defence founded on that sub-section is raised in these circumstances. North having got the car used it in order to go to the premises of a well-known firm of motor engineers

(1) [1911] 1 K. B. 479.
(2) 39 Times L. R. 77. See now ante, p. 282.
(3) See note (2) ante, p. 581.

who employed him for a time as an agent to sell cars of theirs if he could. North appears then to have become acquainted with a man named Cory who was also employed by the firm. North seems to have thought it likely that the defendants, who are themselves dealers in motor cars, might buy this car, but, apparently for reasons of prudence, instead of going to the defendants himself he got Cory to approach them. Cory, as to whom nothing is known either for him or against him, and who has gone where nobody can find him, went to the defendants, told them that North had this car, which he was able to show them, for sale at the very low price of 110*l.*, and asked them to buy it. I need not for the moment consider whether the defendants dealt with Cory or with North, I need only now say that they ultimately bought the car. On the assumption that for this purpose North was the seller of the car to the defendants, it is said that the plaintiff by his conduct is estopped from denying North's authority to sell to them. I cannot follow the argument that was addressed to me on behalf of the defendants on this part of the case. It is true that the plaintiff was very trustful in parting with the possession of the car, and in letting North go on using the car without accounting for the price. He was not so careful as he should have been in his own interest, but that does not mean that he was negligent in the sense that he broke some duty that he owed to the defendants. Negligence, in order to give rise to a defence under the section in question, must be more than mere carelessness on the part of a person in the conduct of his own affairs, and must amount to a disregard of his obligations towards the person who is setting up the defence. There is, in my opinion, no evidence to show that the plaintiff was negligent in that sense and to justify the defence that he is precluded from denying the seller's authority to sell.

Another defence set up is under the Factors Act, 1889, s. 2 (1), which I have already read. It is said here that North was a mercantile agent, that with the consent of the plaintiff he was in possession of the car, that he sold the car when

(1) See note (1) ante, p. 580.

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acting in the ordinary course of business of a mercantile agent, and that therefore the sale was as valid as if he had been expressly authorized by the owner to make the sale. Do the facts here establish that defence? In my opinion they do not for several reasons. The section says that if a person voluntarily allows a mercantile agent to have possession of a chattel for the purpose of selling it, then the sale effected by the mercantile agent in the ordinary course of business shall be valid subject to the proviso which I will deal with in a moment. In order to see whether that section applies one must consider first whether the owner parted with the possession of the chattel to a mercantile agent. If at the time the owner parted with the possession the recipient was not a mercantile agent, if the owner did not part with the possession to a man who was filling that capacity, then in my opinion the section does not apply. Take the case that I put during the argument: A man who at the time is not carrying on any business, or acting in any business capacity, asks the owner of a car to lend it to him to drive to a place where he has an urgent mission to fulfil, and says that he will bring it back in half an hour. He gets the car by cheating the owner out of the possession of it. The fact that he afterwards becomes a dealer and sells it as a mercantile agent does not bring the case within the section, because the owner in that case did not put it into the power of a mercantile agent to sell and make an apparently good title to the chattel. Here North got possession of this car from the plaintiff at the time when North was not a dealer in cars. He got it by posing as the friend of a man named Hargreaves to drive it to Hargreaves and show it to him. I do not think that North was a mercantile agent within the meaning of this section. He no doubt became an agent for the sale of cars before he got Cory to sell this car to the defendants, but he was not a mercantile agent at the time when he was entrusted with the car by the plaintiff. I do not think that there has ever been any sale by a mercantile agent within the meaning of this section. Another reason why I think this section does not apply is that North, if he was a mercantile agent,

did not sell this car to the defendants. The defendants did not rely upon the position of North as the mercantile agent. On the contrary, when the defendants were told by Cory that North had this car they seem to have been a little suspicious about North, who had not produced any registration book, and they said both in letters and by word of mouth that they made a special point of not buying the car from North. They said by their representative that they knew Cory and were only willing to buy from Cory, and they made out their cheque to Cory. I do not think that North as a mercantile agent ever sold the car to the defendants. Moreover, if North did as a mercantile agent sell the car to the defendants, I do not think that he was acting in "the ordinary course of business of a mercantile agent." The sale was a very peculiar transaction, and it seems to me that that provision of the section was not complied with. For these reasons I do not think that s. 2, sub-s. 1, applies to this case.

If, however, that part of the sub-section does apply, there remains a further very serious question. The sub-section has the following proviso: "provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same." That proviso has two distinct parts. The first requires that the person taking under the disposition acts in good faith. The second, and I think it is different, requires that that person has not notice that the person making the disposition has not authority to make it. In dealing with the proviso the first question that arises is, on whom is the onus of proof? Must the defendant who sets up the section prove that he acted in good faith and without notice, or must the plaintiff who is seeking to assert his title to the goods prove that the defendant was not acting in good faith or that he had notice? I was asked to hold on the authority of *Whitehorn Bros.* v. *Davison* (1) that here the onus was on the plaintiff. I do not think that that case supports that view. In that case

(1) [1911] 1 K. B. 463.

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the question raised turned upon s. 23 of the Sale of Goods Act, 1893, which provides that: "When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title." The language of that section is no doubt somewhat similar to that of the section in question, but I think that it deals with quite a different subject matter. I have no doubt that in *Whitehorn's Case* (1) the Court did hold that the onus is on the plaintiff to prove that the defendant bought in bad faith. That, however, was quite a different case from this, because there the title that the seller would have under that section was a good title. It was a voidable title, but that voidable title had not been avoided at the time when the purchaser bought. The section gave him a good title that he would retain unless it could be shown that he had not bought in good faith or without notice. The Court of Appeal said that if the owner wanted to impeach the title he must prove that the buyer bought in bad faith or had notice. Under s. 2 of the Factors Act, 1889, however, the buyer gets no title apart from the section. He is allowed to get what I may call a statutory title provided he complies with the terms of the section. In order to acquire a title which he would not otherwise have, the buyer has to prove all these things that I have mentioned: that the owner consented to the mercantile agent having possession, that the agent acted in the ordinary course of business, and also, I think, that the buyer acted in good faith and had no notice.

If the onus is on the defendants, they have certainly failed to satisfy me that they had no notice that the person selling the car, that is North, had no authority to sell. Indeed, I think that, for this purpose, wherever the onus rests, the defendants must be taken to have had notice. To begin with, the car appears to have been bought considerably under value, though I do not say that the undervalue was so great as to show actual dishonesty. The defendants have endeavoured to prove that it would have cost them

(1) [1911] 1 K. B. 463.

50*l.* or 60*l.* to put it right, and that must no doubt be taken into account; but to my mind it would not have cost them more than 10*l.* or 12*l.*, an outlay which would have left the car a remarkably cheap one for the defendants. Another peculiar circumstance was that North did not himself come to the defendants about the car, but got Cory to sell it to them. The defendants admit that they were a little suspicious, and made a point of not buying the car from North but from Cory, whom they knew. Neither North nor Cory produced the registration book, and the defendant never asked for it, though the whole object of registration is to facilitate transfers of cars and enable people to know who owns the car. Another circumstance which I cannot overlook is that after the defendants had given a crossed cheque to Cory he came back and asked for an open cheque because, according to him, North had no banking account near at hand and he wanted the money at once, and the defendants then allowed their cashier to cancel the crossed cheque and give an open cheque. All these circumstances were, in my opinion, enough to put the defendants on their guard and to fix them with notice. I do not say that they wickedly shut their eyes to an obvious fraud, but I do say that they did not do what any reasonable man would have done in this case—namely, decline to buy this car without knowing more about it. They thought it was a good bargain and made up their minds too easily to buy the car. I think they must be taken to have had notice of some want of authority in those who purported to sell it to them. Their manager told me in evidence that he felt rather uncomfortable and suspicious about the sale. In my view the defendants ought not in the circumstances to have bought the car.

The result is that all the defences fail, and I therefore give judgment for the plaintiff for the return of the car or its value with costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Chatterton & Co.*

Solicitors for defendants: *Vizard, Oldham, Crowder & Cash.*

J. R.

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Nov. 7, 8, 23, 24;
Dec. 15.

[IN THE COURT OF APPEAL.]

P. SAMUEL AND COMPANY, LIMITED *v.* DUMAS.

[1921. P. 1427.]

GRAHAM JOINT STOCK SHIPPING COMPANY, LIMITED *v.* MERCHANTS MARINE INSURANCE COMPANY, LIMITED (No. 2).

[1921. G. 3569.]

Ship—Mortgage—Insurable Interest of Mortgagee—Separate Insurance—Assignment of Mortgagor's Interest—Ship scuttled—Connivance of Mortgagor—Perils of the Sea—Barratry—General Words—"All other perils, losses," etc.

The owner of a ship purported to mortgage the ship to secure the amount due and to become due to the mortgagee on a current account. The mortgage consisted of a deed of covenant and a statutory first mortgage to be registered in Greece. By the deed the owner assigned to the mortgagee all the shares in the ship and all policies effected or to be effected on the ship or freight and all powers, rights, and remedies thereunder, and in particular a power for the mortgagee to sue in the name of the owner for insurance moneys; and covenanted to insure the ship and her freight and keep them insured and pay the premiums thereon and to produce the receipts therefor and to deliver to the mortgagee the policies duly indorsed or give the mortgagee the guarantee of a broker that he held the policies solely on account of the mortgagee; and the owner appointed the mortgagee his attorney for him and in his name to sue for all insurance moneys on the ship. By the statutory mortgage, which recited the deed above mentioned, the owner covenanted to pay the sums for the time being due, and mortgaged the whole interest in the ship free from incumbrances. The mortgage was never registered in Greece.

In pursuance of the covenant in the deed a time policy for twelve months was taken out by ship brokers, the plaintiffs, "$\frac{\text{and}}{\text{or}}$ as agents as well in their own name as for and in the name of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all" against adventures and perils of the seas and other contingencies including barratry of the master and mariners "and of all other perils, losses, and misfortunes that . . . . shall come to the hurt, detriment, or damage of the said . . . . ship &c., or any part thereof."

During the currency of this policy the ship was scuttled by the master and crew, or some of them, with the connivance of the owner but without any connivance or complicity on the part of the mortgagee. In an action upon the policy by the mortgagee:—

Held, by Bankes L.J. and Eve J.:—

(1.) That the mortgagee had an insurable interest in the ship although the mortgage was never registered in Greece;

(2.) On the facts, that the mortgagee's interest was intended to be separately covered by the policy and was not merely derivative from the owner's interest;

(3.) (Scrutton L.J. dissenting) that the mortgagee was in these circumstances entitled to assert and maintain that the ship was lost by perils of the sea.

Small v. *United Kingdom Insurance Association* [1897] 2 Q. B. 311 followed.

The policy contained a warranty that the amount insured on freight should not exceed 25 per cent. of the value of the hull and machinery if the freight were insured for twelve months, to be proportionately reduced if the freight were insured for a period less than twelve months. The freight was insured against war risks for an amount substantially exceeding the amount limited by the warranty:—

Held, by Bankes and Scrutton L.JJ. and Eve J., that it mattered not that the insurance on freight was against war risks; that there was none the less a breach of the warranty, and that the mortgagee could not recover.

Judgment of Bailhache J. reversed.

By a deed of covenant made between the owner of a ship and his mortgagees the mortgagees agreed to advance a sum of money on the security of a first mortgage under the Greek law on the whole of the ship; and it was agreed that the ship should be kept insured at the expense of the owner against risks of every kind and that all policies of insurance on hull and machinery should be suitably indorsed in favour of the mortgagees and lodged with them along with the mortgage or with brokers on their behalf who should address a letter to the mortgagees acknowledging that the policies were held on behalf of the mortgagees; and further agreed that the ship-owner appointed the mortgagees his true lawful and irrevocable attorneys for him and in his name to sue for all insurance moneys to become due and owing under any policy. A statutory mortgage, which recited the deed of covenant, was executed but never registered in Greece under the Greek law. Certain brokers had taken out a policy in their own names "$\frac{\text{and}}{\text{or}}$ as agents, hereinafter called the assured," reciting that they were duly interested in or authorized as owner agent or otherwise to make the insurance. The policy was upon the hull and machinery of the ship against perils of the seas, barratry of master and mariners and all other perils, losses, and misfortunes, &c. The brokers had written to the mortgagees informing them that this insurance had been effected and that at the request of their client, the owner, they were holding the policy to the order of the mortgagees to the extent of their interest in the ship. During the currency of this policy the ship was scuttled by the master and crew, or some of them, with the connivance of the owner but without any connivance or complicity on the part of the mortgagees. In an action on the policy by the mortgagees:—

Held, by Bankes and Scrutton L.JJ. and Eve J., that the mortgagees could not recover on the policy, the Court upon the true construction of the deed of covenant and of the policy and in view of the circumstances attending the execution of the policy, being of opinion that the mortgagees were not parties to the contract of insurance and that the

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policy was not intended to cover any separate independent interest of the mortgagees as distinct and apart from that of the owner, but that they took a derivative interest in the policy by assignment from the owner, and that his wrongful act debarred him, and consequently the mortgagees, from recovering.

Per Scrutton L.J. on the further ground that a loss by scuttling is not a loss by perils of the seas; nor, when the owner connives at the scuttling, is there a loss either by barratry or under the general words "all other perils, losses, and misfortunes," etc.

Judgment of Greer J. reversed.

P. SAMUEL AND COMPANY, LIMITED *v.* DUMAS.

APPEAL from the judgment of Bailhache J. in an action tried before the learned judge without a jury.

The plaintiffs were P. Samuel & Co., Ld., insurance brokers. The action was brought on a policy of marine insurance in which the plaintiffs were named as the assured. They sued on behalf of D. G. Anghelatos, the owner of the steamship *Gregorios*, and on behalf of one Percy Samuel, who carried on business as P. Samuel & Co., and was a mortgagee of the steamship.

The mortgage agreement was dated September 13, 1920, and made between D. G. Anghelatos thereinafter called the shipowner of the one part and Percy Samuel carrying on business as P. Samuel & Co. thereinafter called the mortgagee of the other part. It recited that the shipowner was the absolute owner free from incumbrances of the steamship formerly called the *Grindon Hall* but then called the *Gregorios* and intended to be registered under the Greek flag at Piræus in Greece, and that the mortgagee had agreed to advance to the shipowner the sum of 22,500*l.* upon having repayment of the same and any other moneys to become due from the shipowner to the mortgagee with interest secured as thereinafter appearing and upon delivery to the mortgagee of (*a*) a statutory or formal first mortgage of the steamship duly executed and registered in Greece (thereinafter referred to as the said mortgage); (*b*) good and approved policies of insurance upon the vessel as thereinafter provided; (*c*) the said indenture itself, and (*d*) bills of exchange. It proceeded to assign all the 100/100th shares in the vessel "and all

policies cover notes slips certificates of entry effected or hereafter to be effected granted or issued on the said steamship and on its appurtenances and also on the freight and outfit of the said steamship and also in respect of the protection and indemnity of the said steamship and the full benefit thereof all powers rights remedies and authorities thereunder and in particular with full power for the mortgagee in the name of the shipowner or otherwise to ask demand sue for and recover the said insurance moneys including the right to compromise any claim or suit and to receive the said insurance moneys or any moneys payable by way of compromise and to give valid and effectual discharges for the same and all the right title interest and demand of the shipowner of in and to the said steamship policies and premises To hold the premises hereby assigned unto the mortgagee as security for the payment of all moneys secured by the said mortgage and of all moneys which may hereafter become payable under any of the provisions hereof." And the indenture further witnessed that the shipowner covenanted and agreed with the mortgagee as follows :—

"1. The shipowner shall pay to the mortgagee the said sum of 22,500*l.* on or before March 13, 1921, together with interest for the same at the rate of $1\frac{1}{2}$ per cent. per annum above the Bank of England rate current for the time being from September 13, 1920, and will also pay all other moneys which may be or become due under the security of the said mortgage and of these presents upon the dates whereon the same shall be or become payable or upon demand and until payment the same shall carry interest at the rate aforesaid.

"2. In addition to the interest above provided for the shipowner shall pay to the mortgagee on the execution of these presents a commission of one half per cent. on the said loan.

"3. The shipowner will immediately upon the execution hereof hand to the mortgagee his acceptances for the whole of the principal sum aforesaid.

"4. The shipowner shall be entitled to repay the whole or any part of the said principal sum of 22,500*l.* or such amount

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as may from time to time remain outstanding at any earlier period than that herein stipulated for upon giving 14 days' previous notice in writing to the mortgagee of his intention to make such repayment and any interest included in the outstanding bills shall be deducted pro rata. . . . .

"6. The shipowner will without delay take such steps as may be necessary to effect the complete registration of the said steamship as a Greek steamship. . . . ."

[By clause 7 the shipowner covenanted to keep the steamship clear of claims and liens prejudicing the mortgage and by clause 8 to keep her seaworthy.]

"9. The shipowner will at all times during the continuance of this security insure and keep insured the said steamship and her freights whether at home or at sea against all losses perils and misfortunes usually covered by marine insurance with first class insurance offices or underwriters or mutual associations as the mortgagee shall from time to time in their (sic) discretion approve and in effecting any such insurance the shipowner will also duly pay the premiums and other sums necessary to keep the said policies in force and produce the receipts therefor to the mortgagee or his agents and will immediately after effecting any such insurance deliver to the mortgagee the stamped policies therefor duly indorsed or give to the mortgagee the guarantee of a broker approved by the mortgagee that he holds such policies solely on account and for the benefit of the mortgagee. . . . .

"11. In the event of any claim arising under the hereinbefore mentioned policies of insurance . . . . the proceeds of the insurance and all other moneys received shall be applied in the case of a partial loss in reinstating the damage which shall have been sustained and in the event of a total loss in repaying to the mortgagee the balance which shall then remain owing hereunder with interest and all costs charges and expenses which may have been reasonably incurred by the mortgagee and any balance shall be paid to the shipowner. All other sums received under such policies of insurance . . . . shall be applied in discharging the claim in respect of which they are paid.

"12. If default shall be made in keeping the said steamship in good seagoing order and condition or in keeping her insured . . . . or delivering any such policies receipts or orders as aforesaid the mortgagee may himself enter upon and repair the said steamship and may insure her and keep her insured or entered as aforesaid and the shipowner will on demand repay to the mortgagee every sum of money expended for the above purposes or any of them . . . . with interest at the rate of 8 per cent. per annum from the time of the same having been expended until repayment and until such repayment the same shall be secured by the said statutory mortgage and these presents and shall be a charge upon the mortgaged premises. . . . ."

[By clause 15 the statutory mortgage became immediately payable if (among other contingencies) "the shipowner shall make default in effecting or delivering policies of insurance or brokers' guarantee receipts certificates of entry or any other instrument as herein stipulated for or make default in payment of any insurance premiums entrance fees calls or contributions in respect thereof. . . . ."]

"18. The shipowner for the purpose of giving effect to and carrying out the provisions of this indenture hereby constitutes and appoints the mortgagee to be his true and lawful attorney for him and in his name to ask demand receive sue for and recover all insurances and other moneys of the said steamship which may become due and owing under the security of the said statutory mortgage and of these presents with full power to compromise any claim or suit and to receive any moneys payable by way of compromise and to do such other acts and things in the name of the shipowner or otherwise as the mortgagee may in his absolute discretion deem to be necessary for the due preservation and enforcement of the said security and on receipt of any such money as aforesaid including any money payable by way of compromise to give proper receipts and discharges for the same. And whatever the mortgagee shall lawfully do in the premises the shipowner does hereby and will thereafter ratify and confirm.

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"19. The mortgagee shall hold the security under the said mortgage of the said steamship not only for the said sum of 22,500*l.* but also for any sum or sums of money together with interest thereon as aforesaid and all charges and expenses incurred in respect thereof which may now or at any future time be owing to him by the shipowner."

The statutory mortgage was headed Mortgage (to secure Account Current, etc.). It was dated September 13, 1920. After describing the *Grindon Hall* to be renamed *Gregorios* and stating that she was registered at Piræus in Greece (1) it continued: "Whereas I Denis Anghelatos . . . . shipowner am indebted in an account current to Messrs. Samuel and Co. . . . . brokers and by an agreement under seal bearing even date herewith and made between myself and the said Samuel & Co. it has been agreed that all moneys now or hereafter to become owing to the said Samuel & Co. in respect of the said account shall become due and payable at the times and in the manner provided in the said agreement with interest as therein specified and if no time is provided for repayment of any such moneys then it is agreed that the same shall be payable on demand Now I the said Denis Anghelatos covenant with the said Samuel & Co. and their assigns to pay to him or them the sums for the time being due on this security, whether by way of principal or interest, at the times and manner aforesaid And for the purpose of better securing the said Samuel & Co. the payment of such sums as last aforesaid, I do hereby mortgage to the said Samuel & Co. 100/100th shares, of which I am the owner in the ship above particularly described, and in her boats, guns, ammunitions, small arms, and appurtenances. Lastly I for myself and my heirs (sic) covenant with the said Samuel & Co. and their assigns that I have power to mortgage in manner aforesaid the above mentioned shares and that the same are free from incumbrances In witness" etc.

In pursuance of the covenant contained in the mortgage agreement the policy of insurance, the subject of the action, was effected on October 19, 1920, by one F. T. Whelar, the

(1) This appeared to be contrary to the fact.

manager of the plaintiffs. It was a time policy and was taken out by the plaintiffs "and/or as agents as well in their own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all," for twelve calendar months beginning at noon on September 25, 1920, and ending at noon on September 25, 1921. The amount insured was 24,000*l.*, part of a larger amount of 105,000*l.* insured upon the hull and machinery of the *Gregorios* valued at 110,000*l.* against adventures and perils of the seas and other contingencies including barratry of the master and mariners "and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said . . . . ship, etc., or any part thereof."

The policy included No. 22 of the Institute Time Clauses, 1920. That clause was as follows: "Warranted that (except as hereinafter mentioned) the amount insured for account of assured and/or their managers on . . . . freight . . . . shall not exceed 15 per cent. of the values of the hull and machinery as stated herein but this warranty shall not restrict the assured's right to cover . . . . (2.) Freight and/or chartered freight and/or anticipated freight on board or not on board, insured for 12 months or other time.—Any amount not exceeding 25 per cent. of the value of hull and machinery as stated herein, but if the insurance be for less than 12 months, the 25 per cent. to be proportionately reduced. . . . . Provided always that a breach of this warranty shall not afford underwriters any defence to a claim by mortgagees or other third parties who may have accepted this policy without notice of such breach of warranty."

On the same day F. T. Whelar effected for the benefit of P. Samuel an insurance on freight against war perils to the amount of 27,500*l.* The slip for this policy was written in the previous month. The policy was taken and kept by the mortgagee.

The mortgage was never registered according to the law of Greece, and the evidence went to show that it never could have been registered according to that law

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because the amount secured thereby was an uncertain amount.

On the morning of February 26, 1921, the *Gregorios* was totally lost about nine miles from Cape De Gata on a voyage from Philippeville on the coast of Algeria to the Tyne with a cargo of iron ore. The plaintiffs claimed upon the policy for the benefit both of the owner and P. Samuel. The defendant Dumas was the underwriter whose name was first on the list of subscribers of the policy.

Bailhache J. gave judgment for the plaintiffs. He held that the vessel was deliberately cast away with the connivance of the owner. From this finding there was no appeal. He held that the policy was taken out not only in the interest of the owner but also in that of the mortgagee ; that the mortgagee, notwithstanding that the mortgage was invalid by Greek law, had an insurable interest in the ship ; that he was innocent of all complicity in her loss, and was therefore entitled to recover as for a loss by perils of the sea. On this last point the learned judge followed *Small* v. *United Kingdom Insurance Association* (1) and a recent decision of Greer J. in *Graham Joint Stock Shipping Co.* v. *Merchants Marine Insurance Co.* (2) He also held that as the over-insurance on freight was against war risks and not against ordinary perils of the sea it did not affect the validity of the policy sued upon. He therefore gave judgment for the plaintiffs.

The defendant Dumas appealed.

R. A. Wright K.C. and *W. L. McNair* for the appellant. The respondent, P. Samuel, the mortgagee, had no insurable interest. He had no legal interest because the security he stipulated for was a mortgage valid according to Greek law. This he never obtained, because the mortgage was never registered according to Greek law ; first because the ship herself was not registered in any Greek port before she was lost ; secondly because the mortgage was not given for any definite sum but was intended to secure a current account which

(1) [1897] 2 Q.B. 42, 311. (2) (1922) 38 Times L. R. 753.

would vary in amount from time to time. He had no equitable interest because in equity the mortgagee is not considered to be the owner: *Lewen* v. *Swasso.* (1)

2. Assuming the respondent had an insurable interest, he was not in fact, and it was never intended that he should be, separately insured. The mortgage agreement clearly contemplated an insurance by the owner of his whole interest in the ship and an assignment by indorsement of the policy to the respondent, who, in order to realize his security, was empowered to sue in the name of the owner: see clauses 9 and 18 of the agreement. His interest therefore, if any, is a derivative interest, and he took it subject to all its infirmities and defects. If the owner could not recover upon the policy neither can the respondent. An owner who scuttles his ship precludes himself from recovering upon a policy of insurance against perils of the sea: Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 55, sub-s. 2 (*a*).

3. If the respondent was separately insured by the policy he must accept as his own the acts of the owner in whose control he left the ship. In *Hobbs* v. *Hannam* (2) the owner of a ship sued on a policy of marine insurance. He had chartered the ship to a charterer who through his agent, Kendal, sent smuggled goods on board, for which the ship was seized and condemned by the Spanish Government. The plaintiff contended that this was barratry. Lord Ellenborough said: "I clearly think the loss is to be imputed to the plaintiff himself. If I give the dominion of my ship to a charterer, his acts are my acts; and in this case Kendal, whose orders the master implicitly obeyed according to his instructions, was in point of law the agent of the plaintiff. Therefore, the loss arose from following his own orders, and there is no pretence for imputing it to barratry." The plaintiff was non-suited.

4. The loss of the ship was not due to a peril of the sea. "The term 'perils of the seas' refers only to fortuitous

(1) (1742) Universal Dictionary of Trade, translated from Savary with Additions and Improvements by Malachy Postlethwayt; Tit. Assurance, 2nd ed. (1757), vol. i., p. 147.

(2) (1811) 3 Camp. 93, 94.

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accidents or casualties of the seas. It does not include the ordinary action of the winds and waves": Marine Insurance Act, 1906, Sch. I., r. 7. Therefore not every loss or damage of which the sea is the immediate cause is covered by the words "perils of the sea": *The Xantho.* (1) Incursion of sea water through the sides of a leaky hulk is not a peril of the sea if there is no weather nor any other fortuitous circumstance contributing to the incursion of water: *Sassoon* v. *Western Assurance Co.* (2) See also *Mountain* v. *Whittle.* (3) A deliberate act cannot be called a fortuitous accident or casualty. *Small* v. *United Kingdom Insurance Association* (4) in so far as it decides the contrary should no longer be followed.

5. Even if the mere incursion of sea water, without any fortuitous or accidental circumstance, were a peril of the sea, it was not in this case the proximate cause of the loss. The proximate cause is not necessarily that which is nearest to the loss in point of time: *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society.* (5) As in that case the torpedo and not the subsequent stranding was held to be the proximate cause of the vessel's loss, so here the scuttling of the *Gregorios*, and not the actual entry of sea water, was the proximate cause of the loss. But the scuttling was a deliberate act and not a fortuitous accident or casualty.

6. The warranty in No. 22 of the Institute Time Clauses, 1920, which was incorporated in the policy sued on, was broken. The amount of insurance on freight was not to exceed 25 per cent. of 110,000*l.*, the value of the hull and machinery—that is to say, it was not to exceed 27,500*l.*—for a twelve months' insurance, to be proportionately reduced if the insurance was for less than twelve months. But the respondents effected for the benefit of the mortgagee an insurance on freight for 27,500*l.* for six months. It is true the insurance was against war risks, but that was equally a breach of the warranty.

(1) (1887) 12 App. Cas. 503, 509.
(2) [1912] A. C. 561.
(3) [1921] 1 A. C. 615.
(4) [1897] 2 Q. B. 311.
(5) [1918] A. C. 350.

A. T. Miller K.C. and *S. L. Porter* (*Sir J. Simon* with them) for the respondents.

[The Court intimated that they were satisfied of the insurable interest of the mortgagee, but not of the amount of that interest.]

The mortgage and the mortgage agreement constitute an English contract to be interpreted by English law and intended to secure a current account. The Greek law is not relevant. Even if at the time of the loss the ship was a Greek ship, and a Greek mortgage had been executed to secure a definite sum of 22,500*l.*, that would not have precluded the mortgagee from enforcing the agreement to execute a mortgage for securing the whole current account. The agreement gave him according to English law an insurable interest up to the full amount of the current account outstanding. But in truth the ship was not a Greek ship. She was never registered in any Greek port, but remained a British ship to the date of her loss. There is therefore no substance in the appellant's first point.

2. On the second point the learned judge has found that the policy was taken out for the benefit of the mortgagee as well as that of the owner. This is a finding of fact and is not to be overruled for any reasons derived from the wording of the mortgage agreement. The parties to that agreement may have contemplated a policy in one form upon the mortgagor's interest only, but effected a policy in another.

3. The vessel was lost by a peril of the sea: *Small* v. *United Kingdom Insurance Association.* (1) Accepting the definition of "perils of the sea" in the Marine Insurance Act, 1906, an event may be a fortuitous accident or casualty to one man although deliberately brought about by another: *Trim District School* v. *Kelly* (2); *Reid* v. *British and Irish Steam Packet Co.* (3) The joint judgment of Lord Campbell C.J. and Coleridge and Wightman JJ. in *Thompson* v. *Hopper* (4) after stating, what cannot be and is not disputed—namely, that the assured cannot seek indemnity for a loss

(1) [1897] 2 Q. B. 42, 311.
(2) [1914] A. C. 667.
(3) [1921] 2 K. B. 319.
(4) (1856) 6 E. & B. 172, 191.

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produced by their own wrongful act, proceeds thus: "The plaintiffs' counsel said truly that the perils of the sea must still be considered the proximate cause of the loss; but so it would have been if the ship had been scuttled or sunk by being wilfully run upon a rock." *Heyman* v. *Parish* (1) supports this view, where Lord Ellenborough held that a loss by barratry was a loss by perils of the sea. The negligence of the shipowner's servants is no defence to an underwriter if the ship is lost in consequence of it. The ship is still lost by perils of the sea: *Trinder, Anderson & Co.* v. *Thames and Mersey Insurance Co.* (2); and none the less because they are brought about by negligent navigation. The wilful default of the owner inducing the loss will debar him from suing on the policy in respect of it on grounds personal to himself: first because no one can take advantage of his own wrong; "secondly, because the wilful act takes from the catastrophe the accidental character which is essential to constitute a peril of the sea," per Collins L.J. (3) This has no application to an innocent mortgagee. As regards him the element of peril which always attends a ship sailing the seas remains constant, and no wilful act of his took from the catastrophe its accidental character. On this point *Small's Case* (4) is conclusive in favour of the respondent. There one Wilkes was the master and a part owner of the ship. Small was the mortgagee of Wilkes' shares. On the assumption that Wilkes had scuttled the ship, there arose the question whether Small had taken part in the appointment of Wilkes as master of the ship. It was held that if he had done so the act of Wilkes was barratrous as against him and he was entitled to recover on a policy of assurance against barratry; but if he had not done so he was entitled to recover as on a loss by perils of the sea. Lord Esher M.R. said (5): "If a stranger had done something wrong to the ship by reason of which the sea had got into the ship, and she had been sent to the bottom, then by insurance law

(1) (1809) 2 Camp. 149.
(2) [1898] 2 Q. B. 114.
(3) [1898] 2 Q. B. 127.
(4) [1897] 2 Q. B. 42, 311.
(5) [1897] 2 Q. B. 313, 314.

that would be a loss by perils of the sea, the proximate cause of the loss being such a peril." The judgment of A. L. Smith L.J. (1) is to the same effect, and Rigby L.J. concurred. If this decision requires support it derives it from the judgments of Lord Herschell and Lord Bramwell in *The Xantho* (2) and from *Hamilton & Co.* v. *Pandorf & Co.* (3)

[SCRUTTON L.J. referred to *Magnus* v. *Buttemer* (4); *Sassoon* v. *Western Assurance Co.* (5); and *Mountain* v. *Whittle.* (6)]

4. If the loss was not due to a peril of the sea, it was due to barratry. "Barratry includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer." Marine Insurance Act, 1906, Sch. I., r. 11. That is not an exhaustive definition of barratry. The word may reasonably include a wrongful act committed by a master or crew to the prejudice of an innocent mortgagee though connived at by the owner. At any rate a wrongful act so committed, if not barratry, is an act ejusdem generis, which would be covered by the general words in the policy "all other perils, losses, and misfortunes that shall come to the . . . . damage" of the ship.

[SCRUTTON L.J. referred to *Soares* v. *Thornton.* (7)]

That case is strongly in the respondents' favour, for the act of the owner was held to be barratrous towards the freighter.

5. The proviso against over-insurance only applies to over-insurance against marine risks, and as far as these insurances are concerned the respondents were within the prescribed limit. The appellant was a party to both insurances and must be taken to have waived performance of the warranty in the proviso.

McNair in reply cited *Nutt* v. *Bourdieu.* (8)

Cur. adv. vult.

(1) [1897] 2 Q. B. 315.
(2) 12 App. Cas. 511, 513, 514.
(3) (1887) 12 App. Cas. 518.
(4) (1852) 11 C. B. 876.
(5) [1912] A. C. 561.
(6) [1921] 1 A. C. 615, 626.
(7) (1817) 7 Taunt. 627.
(8) (1786) 1 T. R. 323.

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Appeal from the judgment of Greer J. in an action tried before the learned judge without a jury.

The plaintiffs were mortgagees of the steamship *Ioanna*. They brought the action to recover 15,000*l.* upon a policy of marine insurance subscribed by the defendants insuring the vessel for twelve calendar months from May 29, 1920, to May 29, 1921, against loss by perils of the seas and barratry of the master and mariners. They alleged that on February 19, 1921, the vessel was totally lost by perils of the sea or barratry off the south coast of Spain.

The defendants alleged that the policy was not taken out by or on behalf of the plaintiffs, and further that the vessel was not lost by perils of the sea or barratry but by the wilful misconduct of the owner Elie Angelis in procuring or conniving at the loss of the vessel.

The steamship *Ioanna* was one of a number of vessels which were being built by Messrs. William Doxford & Sons, Ld., of Sunderland, for a Greek owner named Elie Angelis. The building of these vessels was financed by the plaintiffs, who in December, 1919, held equitable charges on the vessels *Athena*, *Theone*, and a vessel then identified as No. 540 and afterwards known as the *Ioanna*. In March, 1920, a further charge on this vessel was given to the plaintiffs. These charges contained a promise by Angelis to execute a mortgage in a form and with covenants prescribed by the mortgagees, which, as it appeared from other similar instruments of mortgage executed during 1920, included a covenant to insure the vessel in question and keep her insured at the expense of the owner, and that the policies of insurance should be suitably indorsed in favour of the mortgagees and lodged with them or with insurance brokers on their behalf, in which case the brokers should write a letter acknowledging that the policies were held to the order and on behalf of the mortgagees.

One J. A. Mango held a general power of attorney for Angelis and acted for him in all matters concerning the building and insurance of the *Ioanna*. In May, 1920, the following correspondence took place with reference to the insurance :—

May 12. Mango to Messrs. J. W. Hobbs & Co., insurance brokers : "S.S. *Ioanna*. With reference to the 12 months insurance of the above steamer, the same is to commence from her arrival in Smith's dock, Newcastle on Tyne, which date is known to be the 17th inst. unless advised to the contrary."

May 12. Th. J. Psimenos from London (acting apparently for both parties) to the secretary of the plaintiff company in Glasgow : "S.S. *Ioanna* (ex No. 540). This steamer . . . . on which there is a charge in favour of your company, is expected to be delivered to the owner, Mr. Elie Angelis, early next week. According to the agreement I am now preparing the necessary documents for the mortgage of this steamer, and I shall feel greatly obliged if you will kindly have the enclosed petition "—to the Consul-General of Greece —" executed in the usual way and return the same to Messrs. Grahams & Co., London, in due time. All the documents will be finished in the same manner as those of the S.S. *Theone;* therefore I do not think that you will require to have the drafts for your approval before the originals are executed here by the owner. If you prefer to see the drafts, please let me know." . . . .

May 13. J. W. Hobbs & Co. to Mango : "S.S. *Ioanna*. We note that you wish this risk to commence for 12 months from the arrival at Smith's dock, Newcastle on Tyne. We are advising underwriters accordingly." . . . .

May 18. J. W. Hobbs & Co. to the plaintiffs in London : "S.S. *Ioanna*. We beg to advise you that we have effected the insurance on the above vessel for 12 months from a date to be advised on hull and machinery valued at 275,000*l.* as follows : 275,000*l.* Institute Time clauses, 68,750*l.* freight, 41,250*l.* disbursements. At the request of our client Mr. J. A. Mango we agree that we are holding the policies

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to your order to the extent of your interest in the vessel, subject to our lien for unpaid premiums and to having the right to cancel the policies should the premiums not be paid" . . . . .

May 19. Mango wrote to J. W. Hobbs & Co. informing them that the *Ioanna* had arrived at Smith's dock at 4 P.M. on May 17, but that the owner had not been able to take delivery before noon of May 19, and requesting them to arrange for insurances on the vessel while in port as from that date and to have the twelve months' insurance together with six months' war risk so effected as to commence from the time when the vessel left the United Kingdom.

May 19. Messrs. J. W. Hobbs & Co. wrote to Mango assenting to his request as to the port risk insurances and adding: "We have also arranged with underwriters that the 12 months insurance shall commence as from sailing the Tyne—date to be declared."

May 31. Mango wrote to J. W. Hobbs & Co.: "S.S. *Ioanna*. The above left Tyne at 2.40 P.M. on the 29th inst., and I shall be glad if you will have the 12 months marine and 6 months war risks insurance commenced as from noon of that day."

Messrs. J. W. Hobbs & Co. agreed. The policy the subject of this action was dated June 15, 1920, the original slip having been initialled some six months before. The policy was in the following form: "The Merchants' Marine Insurance Company, Limited. Whereas J. W. Hobbs and Co. $\frac{\text{and}}{\text{or}}$ as agents hereinafter called the assured have represented to the Merchants' Marine Insurance Company, Limited, that they are interested in or duly authorized as owner agent or otherwise to make the insurance hereinafter mentioned and described with the said Company and have promised or otherwise obliged themselves to pay forthwith for the use of the said company . . . . the sum of 750*l.* as a premium at and after the rate of 5*l.* per cent. for such insurance Now this policy of insurance witnesseth that in consideration of the premises and of the said premium the said company promises and agrees with the assured . . . . that the said

company will pay and make good all such losses and damages hereinafter expressed as may happen to the subject matter of this policy and may attach to this policy in respect of the sum of 15,000*l.* insured which insurance is hereby declared to be upon:—

Hull, materials, &c., valued at ..	210,000*l.*	
Machinery, boilers and everything connected therewith, valued at ..	65,000*l.*	275,000*l.*

in the ship or vessel called the *Ioanna* S.S. . . . . vessel lost or not lost and for and during the space of 12 calendar months from noon May 29, 1920, to noon May 29, 1921, beginning and ending with Greenwich mean time. Warranted free from capture, seizure . . . . and also from all consequences of hostilities or warlike operations whether before or after declaration of war. . . . . And touching the adventures and perils which the said company are made liable unto . . . . by this insurance they are of the seas . . . . barratry of the master and mariners and of all other perils losses and misfortunes that . . . . shall come to the hurt detriment or damage of the aforesaid subject matter of this insurance." . . . .

The equitable charges upon the *Ioanna* were superseded by a mortgage agreement sealed as a deed. This instrument was dated July 28, 1920, although its terms had been agreed to before that date. It was made between Elie Angelis thereinafter called the owner of the first part and the Graham Joint Stock Shipping Co., Limited, thereinafter called the mortgagees of the second part and witnessed that it had been agreed that the mortgagees should lend to the owner on or about May 21, 1920, the sum of 145,000*l.* subject to discount charges as thereinafter mentioned upon the security of (1.) a first mortgage under the Greek law (thereinafter referred to as the mortgage) on sixty-four sixty-fourth shares of the steamship *Ioanna* (built by Messrs. William Doxford & Sons, Ld., of Sunderland; identification No. 540) of 5171 tons gross registered at the Port of Piraeus (1) in the Kingdom of Greece belonging to the owner; (2.) a personal guarantee

(1) Apparently the *Ioanna* was never registered at any Greek port.

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by the owner for the repayment as after mentioned of all the instalments of the said loan and all interest which might be due thereon and also the due performance and observation of all the covenants agreements and stipulations on the part of the owner therein contained. And, among other stipulations, the owner agreed to keep the steamship in a good and seaworthy condition, and to maintain her present classification in Lloyd's Register—namely, 100 A1, and to permit the mortgagees or any person appointed by them to enter upon and view the condition of the steamship, and to call upon the owner to repair defects, and if these should not be repaired within a specified time to engage others to repair them at the owner's expense.

Clause 8 of this agreement was in these terms: "The said steamship shall be insured at the expense of the owner against all risks of every kind especially including risks resulting from the recent war and any other war risks and that to the extent of not less than the amount of the said loan from time to time outstanding and shall be kept so insured during the currency thereof and all policies of insurance on which the premiums have been fully paid over the hull machinery and appurtenances of the said steamship shall be suitably indorsed in favour of the mortgagees and shall be lodged either with them along with the mortgage or with Messrs. Joseph W. Hobbs & Co. . . . . on their behalf in which event the said Messrs. Joseph W. Hobbs & Co. shall address to the mortgagees a letter stating the details of the policies and acknowledging that they are held to the order of and on behalf of the mortgagees."

Art. 20 provided as follows: "Lastly the owner for the purpose of giving effect to and carrying out the provisions of this agreement and the mortgage hereby constitutes and appoints the mortgagees to be his true lawful and irrevocable attorneys for him and in his name to ask demand receive sue for and recover all insurance and indemnity moneys freight general average contributions and other moneys of the above named steamship which may become due and owing under the security of the mortgage and of these presents or any policy

or charterparty or otherwise and to do all such other acts and things in the name of the owner or otherwise as may be necessary for collection thereof and the due enforcement of the said security and on receipt of any such moneys as aforesaid to give proper receipts and discharges for the same And whatever the mortgagees shall lawfully do in the premises the owner hereby ratifies and confirms." The agreement was signed and sealed by E. Angelis by his attorney J. A. Mango.

The mortgage was dated September 1, 1920. After describing the *Ioanna* and reciting the agreement of July 28 it continued thus: "Now I the undersigned Elie Angelis in consideration of the premises for myself and my heirs (sic) covenant with the said Graham Joint Stock Shipping Company, Limited, and their assigns to pay to them the sums for the time being due on this security whether by way of principal or interest at the times and in the manner aforesaid And for the purpose of better securing to the said Graham Joint Stock Shipping Co., Ld., the payment of such sums as last aforesaid do hereby mortgage to the said (blank) sixty-four sixty-fourth shares of which I am the owner in the ship above particularly described and in her boats guns ammunitions small arms and appurtenances." There followed a covenant that the owner had power to mortgage and that the vessel was free from encumbrances. The mortgage was signed and sealed by E. Angelis by his attorney J. A. Mango.

On February 1, 1921, the *Ioanna* sailed on a voyage from Norfolk, Virginia, bound for Gibraltar for orders. At Gibraltar she got orders to proceed to Naples. On February 19 she reached a point near Cape De Gata on the south-east corner of the Spanish coast. At 2.40 P.M. on that day the captain, a Greek named Papadakis, set an unusual course. At about 10.30 P.M., when the vessel was about fifteen miles from land, an explosion was heard, and within ten minutes afterwards the captain and crew took to the boats and the vessel subsequently sank in circumstances tending to implicate the owner and the master and the crew, or some of them, in her loss.

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Greer J. came to the conclusion that water was intentionally let into the vessel by some of the officers or members of the crew in circumstances which would amount to barratry if the owner were not a party; but that the vessel was wilfully destroyed with the assent and by the authority of the owner. The learned judge found that the plaintiffs were parties to the contract of insurance and that it was the intention of Mr. Mango, and of Mr. Hobbs, who took out the policy, that it should be on behalf of all those concerned, and that one of the parties concerned whom they had in mind were the mortgagees who, being at the least equitable mortgagees, had an insurable interest in the ship. Upon those findings he gave judgment for the plaintiffs.

The defendants appealed.

R. A. Wright K.C. and *Claughton Scott* for the appellants. There was no evidence on which the learned judge could find that the respondents were parties to the contract of insurance. The onus of proving that the policy was effected to cover their interest lay upon them. The intention of the person who directs the policy to be effected is the important matter: *Boston Fruit Co.* v. *British and Foreign Marine Insurance Co.* (1) There was no evidence that Mango intended to insure for anybody but Angelis the owner. Such evidence as there is leads to the opposite conclusion. The obligation of the owner under the deed of covenant was satisfied by insuring his own interest in the ship and then assigning the policy to the respondents or procuring the brokers to write a letter to the respondents acknowledging that the policy was held for them. If the respondents were not direct parties to the contract of insurance, but only took by assignment from the owner, they cannot be in a better position than he would be. He by his wrongful act has debarred himself from suing on the policy: Marine Insurance Act, 1906, s. 55, sub-s. 2 (*a*).

[Counsel also argued (1.) that the respondents had no insurable interest and (2.) that the loss was not due to perils of the sea, barratry, or any peril insured against. As these

(1) [1906] A. C. 336.

arguments were substantially the same as those advanced in *P. Samuel & Co., Ld.* v. *Dumas* (1) it is not thought necessary to elaborate them further.]

Jowitt K.C. and *James Dickinson* for the respondents.

The following cases were cited in addition to those cited in *P. Samuel & Co.* v. *Dumas* (1): *Nichols* v. *Scottish Union and National Insurance Co.* (2); Bunyon on Fire Insurance (3); MacGillivray on Insurance (4); *Dudgeon* v. *Pembroke* (5); *Blyth* v. *Shepherd.* (6)

Cur. adv. vult.

Dec. 15. The following written judgments were delivered.

P. SAMUEL AND COMPANY, LIMITED *v.* DUMAS.

BANKES L.J. The appellant was one of the subscribers to a policy of marine insurance for 24,000*l.* dated October 19, 1920, upon hull, machinery, etc., of the steamship *Gregorios*, valued at 110,000*l.* Whilst so insured the vessel was lost, and the learned judge who tried this action held that she was deliberately cast away with the connivance of the owner. There is no appeal from that decision. The question to which the present appeal relates is as to the position of Mr. Percy Samuel, who claims to be a mortgagee of the vessel. The respondents carry on business as insurance and chartering brokers. The policy was taken out in their name. In the present action they claimed to sue on behalf of Mr. Percy Samuel as mortgagee of the vessel. Both branches of this contention were disputed by the appellant. In the first place it was contended that the policy was not taken out to cover the separate interest of the alleged mortgagee, and secondly it was contended that he had no insurable interest. The learned judge decided both points in the respondents' favour. In this I think that he was right. The first question depends upon what was the intention of the owner and of the mortgagee when the policy was taken out. The

(1) Ante, p. 594.
(2) (1885) 14 R. 1094, Appendix; 2 Times L. R. 190.
(3) 6th ed. (1913), p. 376.
(4) P. 713.
(5) (1877) 2 App. Cas. 284, 295.
(6) (1842) 9 M. & W. 763.

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insurance was effected by a Mr. Whelar, the manager of the respondent company. He was called as a witness, and he deposed to facts upon which, in my opinion, the learned judge was quite justified in coming to the conclusion that the intention of all material parties was that the insurance should be taken out to cover the separate interests of both mortgagor and mortgagee. I understood that Mr. Wright desired to raise a question as to whether it was possible to carry out such an intention in a single document expressed in the ordinary language of a policy of marine insurance. In this Court no argument that this was impossible could prevail. In many cases it has been held that an insurance of the two separate interests has been effectively made in the one document. Though the Court differed in opinion as to the effect of such an insurance in *Ebsworth* v. *Alliance Marine Insurance Co.* (1), they agreed as to the possibility of its being effected. Bovill C.J. says: "Prima facie, an insurance by a mortgagee, whether legal or equitable, would cover only his own particular interest in the goods; but, if the insurance was, as between him and the underwriters, intended to cover the interest of all parties and the whole value of the goods, there would be no objection to a legal mortgagee so insuring in his own name to cover all the interests and the entire value of the goods: and we think there is equally no objection to an equitable mortgagee, or a person who stands in a similar position, insuring in like manner. An insurable interest is clearly not confined to a strict legal right of property. It then becomes a question of fact what was the interest intended to be covered by the policy. If it was only the individual interest of the mortgagee, he could recover only the amount of that interest; but, if the insurance was intended to cover the interest of the mortgagor also, then he would be entitled to recover in his own name for both interests: see *Irving* v. *Richardson*." (2) This view has been acted upon in many subsequent cases and notably in *Small's Case* (3), to which I must refer later.

(1) (1873) L. R. 8 C. P. 596, 609. (2) (1831) 2 B. & Ad. 193.
(3) [1897] 2 Q. B. 311.

The argument that Mr. Percy Samuel was a mere creditor of the owner of the vessel, and had no insurable interest in her at all, was rested upon the fact that Mr. Samuel had never acquired any interest in the vessel under the Greek law up to the time that she was lost. I think that the appellant did establish that fact, but I consider that the learned judge was right in considering that for the present purpose the fact was immaterial, because under the mortgage agreement of September 13, 1920, and the statutory mortgage of the same date, Mr. Percy Samuel had acquired an equitable right which gave him an insurable interest in the vessel.

Assuming that the views which I have just expressed are correct, two questions of very considerable importance arise for decision—namely, the question whether a mortgagee can claim that his position is not affected by the deliberate casting away of the vessel by the mortgagor, and the question whether when a vessel has been so cast away the mortgagee can successfully contend that she was lost by a peril of the sea. After very careful consideration, I have come to the conclusion that neither point is open for consideration in this Court. This was the view taken of *Small's Case* (1) by both Greer J. (2) and Bailhache J. It is no doubt possible to point to distinctions between the facts of that case and the facts of the present case, and to note that in the Court below Matthew J. confined his judgment strictly to the question raised by the order to try the preliminary point, and that in the Court of Appeal counsel did not discuss what the position of the mortgagee would be if the Court had to consider his position apart from the question of barratry. The fact however remains that the Court did give as one of the two grounds upon which the judgment proceeded that assuming that the master was not the servant of the mortgagee and his act in scuttling the ship consequently not an act of barratry, yet the mortgagee was entitled to recover because the loss of the vessel was due to a peril of the sea. Much

(1) [1897] 2 Q. B. 42, 311.
(2) In *Graham Joint Stock Shipping Co.* v. *Merchants' Marine Insurance Co.* 38 Times L. R. 753.

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as I may suspect that a higher tribunal may take a different view, I feel that I am bound to respect and act upon what I believe to be a material part of the judgment in *Small's Case* (1) and not mere obiter dicta of the Lords Justices who decided that case.

I pass therefore to consider another and again an important point. The appellant contends that there has been a breach of warranty of one of the Institute Time Clauses which vitiates the policy. The clause is that dealing with insurance beyond a specified amount. It is not disputed that an insurance against war risks upon freight was effected for a larger amount than that stipulated for in the clause. It was contended that this fact was immaterial, and no breach of the warranty, because the clause relied on was contained in a policy against marine risks and must be confined to insurance of those risks. The learned judge accepted this contention. With respect to him, I take the opposite view. The clause is one dealing with insurance of the subject matter, and not with the nature of the risks to which the policy attaches. The language of the clause is quite general. There are no words indicating that it is to be confined to insurances against marine risks, nor do I think that there is anything in the nature of the contract contained in the warranty to require the Court to narrow the ordinary interpretation of the language used by the parties. The object of the clause is to reduce the temptation which may follow upon over-insurance. There is no reason why in the absence of express words the Court should seek to limit the operation of the clause. It was said, however, that assuming the view which I have just expressed as to the construction of the clause to be correct, the respondent is protected by the proviso to the clause, which is in these words: "Provided always that a breach of this warranty shall not afford underwriters any defence to a claim by mortgagees who may have accepted this policy without notice of such breach of warranty." Assuming, but not deciding, that the proviso has any application to the case of a single policy taken out to cover the separate interests of

(1) [1897] 2 Q. B. 42, 311.

mortgagor and mortgagee, it is sufficient to say that in the present case there was notice. Mr. Whelar effected both the marine and the war risk insurances on the same day. Under these circumstances want of notice cannot be established. As this point on the warranty clause goes to the root of the claim, it is not necessary to express any opinion on a number of other points which were raised in argument. In my opinion the appeal must be allowed with costs, and the judgment entered for the respondents must be set aside and entered for the appellants with costs.

SCRUTTON L.J. This case raises, besides several points peculiar to the case, a question of great general importance and some difficulty. The plaintiffs had an agreement by which certain shares in a ship were to be assigned to them as security for a loan. For the purposes of the question, I assume they had an insurable interest. A policy was effected which again, for the purposes of the question, I assume to have been effected directly on their behalf, and not merely assigned to them by the owner as additional security for the loan. In the latter case they would be subject to any defences available against the owner. The owner then scuttled the ship, which sank in consequence. The appellants were not privy to the scuttling. Can they recover against the underwriters for a loss either (1.) by perils of the sea; (2.) barratry; or (3.) under the general words "and other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the said . . . . ship, &c., or any part thereof"? If they can, the underwriters are in effect insuring against deliberate scuttling by the owner, in cases where the assured is a mortgagee, and it will become vital to the insurer to know what has been supposed to be immaterial, the name of the assured and his exact interest in the ship. Insisting on a loss by perils of the sea the assured presented an argument based on the assumption that every loss by sea water was a loss by a peril of the sea, the cause of the entry of the sea water being a remote and not a proximate cause, and therefore to be disregarded. This contention is supported by the undoubted

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presumption that if a ship is lost at sea and nothing else is known, she is taken to be lost by perils of the sea, loss by any other cause being generally heard of: *Green* v. *Brown*. (1) On being asked whether a goods owner insured against perils of the sea could recover if a malicious stranger in a salt water dock threw a pail of sea water over his goods, counsel however thought he could not. As Lord Finlay says in *Mountain* v. *Whittle* (2), "A loss caused by the entrance of sea water is not necessarily a loss by perils of the sea." The loss must be a peril, and the peril must be of the seas, not merely on the sea: see Lord Herschell in *The Xantho* (3); Lord Halsbury in *Hamilton* v. *Pandorf*. (4)

The Marine Insurance Act, by r. 7 of the First Schedule, defines "perils of the seas" thus: "The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves." The expression is not happy; it is not clear what kind of "accident or casualty" is not "fortuitous," or what is an intentional accident. I imagine the draftsman took "fortuitous" from the judgment of Lord Halsbury in *Hamilton & Co.* v. *Pandorf & Co.* (5), and "accident or casualty" from the judgment of Lord Herschell in *The Xantho* (6) and combined the two, without any very intelligent idea of why he did so. But it is clear that there must be a peril, an unforeseen and evitable accident, not a contemplated and inevitable result; and it must be of the seas, not merely on the seas. The ordinary action of the winds and waves is "of the seas," but not a "peril." Damage by taking the ground in the ordinary course of navigation in a tidal harbour is "of the seas" but not a "peril," being contemplated and intended: *Magnus* v. *Buttemer*. (7) So also damage by sea water directly and intentionally admitted by the owner may be said to be "of the seas," but not a "peril." As Collins L.J. says in *Trinder, Anderson & Co.* v. *Thames and Mersey Marine*

(1) (1744) 2 Stra. 1199.
(2) [1921] 1 A. C. 615, 626.
(3) 12 App. Cas. 503, 509.
(4) 12 App. Cas. 518, 523.
(5) 12 App. Cas. 524.
(6) 12 App. Cas. 509.
(7) 11 C. B. 876.

Insurance Co. (1): "The wilful act"—of the owner inducing the loss—"takes from the catastrophe the accidental character which is essential to constitute a peril of the sea." In *The Chasca* (2) Dr. Phillimore in a bill of lading case held that a ship which sank through sea water admitted through holes intentionally bored by the crew was not lost by perils of the sea.

Recent decisions of the House of Lords and Privy Council have elucidated the effect of the maxim "Causa proxima non remota spectatur," which used to be considered as directed to the proximate cause in time, but is now to be taken as referring to the "dominant" or "effective cause," even though it be not nearest in time. Thus if a torpedo makes a hole in a ship whereby she is unable to resist a subsequent storm, the torpedo or hostilities is the dominant and proximate cause and not perils of the sea: *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society.* (3) Where a ship is insured against collision only, and a collision makes a hole, which is negligently repaired, and owing to the negligence, water comes in again, the collision, and not the negligence or subsequent entry of water, is the dominant and proximate cause, and the assured recovers on the policy against collision: *Reischer* v. *Borwick* (4), approved by the House of Lords in the *Leyland Shipping Co.'s Case.* (3) So in *Sassoon's Case* (5), where cargo, insured on a time policy with no warranty of seaworthiness, in a hulk in a river was damaged by sea water which entered in fine weather through the rotten condition of the hull, Lord Mersey, giving the judgment of the Privy Council, held the loss was not by perils of the sea. He said, "Although sea water damaged the goods, no peril of the sea contributed either proximately or remotely to the loss."

An event may be an accident against one person though intentionally done by another. In workmen's compensation cases, murder may be an accident to the man murdered. In shipping cases, the intentional sticking of hooks by stevedores

(1) [1898] 2 Q. B. 114, 127.
(2) (1875) L. R. 4 A. & E. 446.
(3) [1918] A. C. 350.
(4) [1894] 2 Q. B. 548.
(5) [1912] A. C. 561, 563.

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into bags of goods may be an accident as against the ship-owner or goods owner: *The Torbryan.* (1) This may well be an explanation of some of the perils where human action is the dominant cause. Damage by collision with a ship negligently navigated is a peril of the sea, because it is a sea risk that other sailors should be negligent and other ships collide and do damage which to the ship damaged is an accident. Damage by negligence of the crew of the ship insured, though a dominant cause, may still be an accident incidental to navigating a ship at sea, to which the owner who must employ crews at sea is exposed. But damage by intention of the owner certainly is not an accident to himself, and I know of no case where intentional damage by one co-owner has been held recoverable by an innocent co-owner unless the damage-feasor has held a position in the navigation of the ship as master or in control of the navigation, and then the innocent co-owner in my view recovers for barratry of the master, and not for perils of the sea. I am of the opinion which the judge below would have acted upon had he not held that he was bound by the view taken by Greer J. of *Small's Case.* (2) I think that where sea water is directly and intentionally admitted by the owner so that the ship sinks, the loss is not by perils of the seas. Assuming that it may be an accident against innocent persons interested in the safety of the ship, it is not an accident of the seas, though it happens on the seas.

The authorities which the learned judge followed are *Small's Case* (3) and the judgment of Greer J., who held that the principle of that case applied to the similar facts in *Graham Joint Stock Shipping Co.* v. *Merchants' Marine Insurance Co.* (4) *Small's Case* (3) requires the most careful consideration. A ship was scuttled by its master, Wilkes, who was one of three co-owners, the other two being innocent of the scuttling. Small, a mortgagee, sued on a policy for the loss of the ship. I gather from the report in the first Court he alleged loss by barratry. The

(1) [1903] P. 194.
(2) [1897] 2 Q. B. 311.
(3) [1897] 2 Q. B. 42, 311.
(4) 38 Times L. R. 753.

question whether the mortgagee could recover was ordered to be argued as a preliminary point on the assumption that the master had wilfully cast away the ship. A good deal of the judgments of the two Courts is taken up with the discussion whether the mortgagee was directly insured, or whether only making title through Wilkes, the captain, who effected the policy, he was affected by the defences available against Wilkes. That point is not material to this part of the case. Mathew J. held that the mortgagee's position was analogous to that of a co-owner, and that he could recover for barratry even without the general words of the policy. On appeal the further point was raised that the wilful casting away by the master could not be barratry against the mortgagee, because the master was not appointed by the mortgagee. Lord Esher took the view that there was a dilemma. Either the captain was the captain for the mortgagee, in which case his conduct was barratry; or he was not, in which case his admission of sea water was a peril of the sea. A. L. Smith L.J. thought that the master was the master of the mortgagee, and therefore his conduct was barratrous; but that if he was not there was a loss by the admission of sea water by a stranger to the mortgagee, which was a peril of the sea. The question of peril of the sea does not appear to have been raised in the lower Court, or in the argument in the higher Court.

I have given most careful consideration to this case, and have come to the conclusion that this Court is not bound by the views expressed in it, though of course they must be treated as of great weight. I think so for two reasons: (1.) *Small's Case* (1) is the case of a master navigating a ship, who is treated as not the less master because he is co-owner. The distinction between the two characters is emphasized in *Westport Coal Co.* v. *McPhail* (2), where negligence of a master was not attributed to the co-owner as such, but only in his character as master. In *Jones* v. *Nicholson* (3) the fraudulent act of a co-owner who is master was held to be

(1) [1897] 2 Q. B. 42, 311. (2) [1898] 2 Q. B. 130.
(3) (1854) 10 Ex. 28.

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barratrous because it is the act of a master in fraud of another owner, but as Alderson B. says (1), "it cannot be a fraudulent act when he is sole owner." In the present case the scuttling is the act of the sole owner; any share of the master in it was not barratrous, for it was not a fraud against the owner, but with his privity. In *Small's Case* (2) the vessel was cast away by a master in fraud of an owner. In the present case the casting away is by the sole owner, and I know of no case, and counsel could refer us to none, where the owner has recovered for a loss directly and intentionally caused by his co-owner, not being a master or member of the crew, or where an owner of goods has recovered for damage to his goods by sea water intentionally admitted by the owner of the ship, either for perils of the sea or barratry. Secondly, so far as two judges of the Court of Appeal say that intentional admission of sea water by a stranger is a peril of the sea, I am relieved, in my view, from following it, if I disagree with it, as I do, by the later authority of the House of Lords in the *Leyland Shipping Co.'s Case* (3), explaining the meaning of causa proxima as dominant or effective cause. I think it follows from that case that where a stranger, and still more an owner, directly and intentionally lets sea water into a ship, the dominant, effective, or proximate cause of the loss is the deliberate action of the owner, and not any peril of the sea. For these two reasons I do not think we are bound by the decision in *Small's Case* (2), but I am free to follow my own opinion that there is no loss here by perils of the sea.

I am of opinion there was here no loss by barratry. As Lord Mansfield said in *Nutt* v. *Bourdieu* (4): "The point to be considered is whether barratry . . . . can be committed against any but the owners of the ship? It is clear beyond contradiction that it cannot. . . . . An owner cannot commit barratry. He may make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry." Barratry can be committed by a master or person acting as navigator controlling the ship against a charterer who is

(1) 10 Ex. 38.
(2) [1897] 2 Q. B. 42, 311.
(3) [1918] A. C. 350.
(4) 1 T. R. 323, 330.

charterer by demise, and temporary owner of the ship, under the old authorities reproduced in the definition in the Schedule to the Marine Insurance Act. But in my view an owner scuttling the ship, though he may commit an act in fraud of the mortgagee who is not in possession, does not commit barratry, as defined in that schedule: "every wrongful act committed by the master and crew to the prejudice of the owner." Had not the judges in *Small's Case* (1) thought otherwise, I should have been clear that s. 34 of the Merchant Shipping Act, 1894, which provides that the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, except so far as may be necessary for making a mortgaged ship available as security, did not enable a mortgagee not in possession to call himself an owner, not for the purpose of making the ship his security, but for the purpose of suing on a policy for barratry against himself as owner. Neither do I think the general words, "all other perils, losses, and misfortunes," enable the mortgagee to treat the deliberate act of an owner in fraud of a mortgagee as something like barratry. As explained in *Thames and Mersey Marine Insurance Co.* v. *Hamilton & Co.* (2), the *Inchmaree* case, by the House of Lords, the general words are not inserted to cover every loss of whatever kind to the subject matter insured, but are limited to perils of a like kind with those specifically mentioned. The deliberate act of the owner against his co-owner, mortgagee, or underwriter is not, in my opinion, of the like kind with the deliberate act of the captain or crew in fraud of their owner and principal, but a much more serious and entirely different kind of loss from barratry. I cannot bring this loss within the general words.

In my opinion, therefore, the innocent mortgagee out of possession cannot recover on a policy for intentional scuttling of the ship by the owner, either as a loss by perils of the sea, or barratry, or under the general words.

The same result, however, follows on a narrower ground peculiar to this case. The policy sued on incorporates the Institute Time Clauses, clause 22 of which warrants that

(1) (1897) 2 Q. B. 42, 311. (2) (1887) 12 App. Cas. 484.

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the amount insured for account of assured $\frac{\text{and}}{\text{or}}$ their managers on certain named matters, including freight, shall not exceed certain specified limits, in the case of freight "not exceeding 25 per cent. of the value of hull and machinery as stated herein, but if the insurance be for less than 12 months, the 25 per cent. to be proportionately reduced." The values stated therein were 110,000*l.*, 25 per cent. of which is 27,500*l.*, and the limit for a six months' insurance would be 13,750*l.* But in September, 1920, there was insured by the brokers for the benefit of the mortgagees 27,500*l.* on freight against war perils, and the policy was taken and kept by the mortgagees. It is argued by the mortgagees, and found by the judge, that as this is an insurance against war perils, it does not affect a policy on marine perils, because, as the judge says, the marine underwriter would not have to pay a loss by war perils. This involves reading into the policy the words "against marine perils" in the first line of clause 22 after the words "amount insured." I see no reason for inserting these words, and every reason for not inserting them. Warranties are construed strictly. The reason for this warranty is that the insured should not, by heavy insurances p.p.i., have an opportunity of over-valuing his ship, and a temptation to lose her. This temptation is just as great if the over-valuation and over-insurance are on war risk policies, as if they are on marine policies. Indeed, so long as war risks, producing loss by sinking, may be argued to be losses by perils of the sea, by the incursion of sea water, war risk policies may be very important to the marine underwriter. In the present case the attempt was first made to recover on a fictitious explosion as a war risk, and then changed to a claim in respect of a marine peril. Two other defences were suggested to this clause. It was faintly said that under the proviso the mortgagees had accepted the marine policy without notice of the breach of warranty. But as the marine policy was delivered in October, and the war risk slip was written by the brokers for the mortgagees in September, this obviously failed. Lastly it was said that one particular underwriter, Dumas, was a party to both marine and war

risk policies, and by writing the latter had waived the breach of the former. I could not understand how this result followed. In my opinion, therefore, there was a breach of this warranty which would have prevented the mortgagees, if their claim was otherwise good, from recovering on this policy.

These two conclusions render it unnecessary finally to decide the points raised by the underwriters : (1.) that the mortgagees were not originally interested in the policies, but only as assignees, in which case the admitted defence of scuttling against the owner would also be a good defence against his assignees. On this I am inclined to take the view that as the owner intended to insure for the benefit of the mortgagees, who themselves joined in the instructions to insure, they were original parties to the policy ; and that the fact that they in the agreement of mortgage contemplated an assignment was not available to the underwriters as a defence if the mortgagees did not in fact carry out the insurance in that way. (2.) A variety of points were raised to the effect that the mortgagees had no insurable interest because they had no valid insurance by Greek law, which does not recognize an insurance for an account current of unspecified amount, and requires registration before loss of the vessel. On this I was inclined to think that the mortgagees had an agreement to receive a charge on shares in the ship, if not lost, which gave them an insurable interest in the safety of the ship at the time of the loss, and was not defeated by her loss before the security was perfected. Upon some difficult points as to the law by which the security was to be governed, and the extent to which English Courts would enforce some and what security, I should desire to reserve my opinion.

It is unnecessary to deal with certain questions of figures as to the amount of the judgment. But for the two reasons given, I am of opinion that the appeal succeeds, and judgment should be entered for the defendants here and below.

EVE J. This action, instituted on May 20, 1921, was brought to recover from the first defendants the sum of 20,000*l.*, and, alternatively from the second defendant, the

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sum of 75*l.*, their respective subscriptions to two policies of marine insurance, the one against war risks, and the other against the ordinary marine risks, effected by the plaintiffs for six months and twelve months respectively from September 25, 1920, in the steamship *Gregorios*. The plaintiffs alleged that the said insurances were, and each of them was, effected by them for and on behalf of D. G. Anghelatos, the owner of the ship, and Percy Samuel the mortgagee thereof, and that on or about February 26, 1921, she became a total loss by the perils insured against or one of them. In the course of the trial the war risk underwriters were dismissed from the action, and at its conclusion the learned judge found that the ship had been wilfully cast away by some of the crew with the knowledge and connivance of the owner. He however gave judgment for the plaintiffs against the defendant Dumas for his proportion of the sum of 102,641*l.* 8*s.* 3*d.* alleged to be due to the mortgagee—who it is not suggested was in any way privy to the scuttling—feeling constrained so to do by the conclusion then recently arrived at by Greer J. in *Graham Joint Stock Shipping Co.* v. *Merchants Marine Insurance Co.* (1) that in *Small* v. *United Kingdom Insurance Corporation* (2) this Court had decided that the loss of a ship by the incursion of sea water brought about by the felonious act of the owner, is a peril against which an innocent mortgagee is insured by the ordinary marine risks policy.

This appeal has been brought by the defendant Dumas primarily to have this important point decided, but before turning to consider the main grounds on which the mortgagee's right to recover is disputed, there are some preliminary matters raised by the appellant as a defence to the action and on this appeal, with which it is necessary to deal.

The first point is that the mortgagee was never separately insured, but was merely an assignee of the policy, subject therefore to the equities affecting the mortgagor, and disqualified in the circumstances existing from asserting any higher right to recover the insurance moneys than the mortgagor could maintain. This question in the main falls

(1) 38 Times L. R. 753. (2) [1897] 2 Q. B. 311.

to be determined as one of fact. I say "in the main" because there must be cases wherein its solution depends more on the true construction of the mortgage contract and the documents connected therewith than on direct evidence of intention on the part of either the mortgagee, the mortgagor, or the brokers. In this case there was some evidence to support the finding of the judge that the mortgagee was a party to the contract of insurance and not a mere assignee of the policy, and although clauses 9 and 18 of the deed of September 13, 1920, raise some doubt in my mind whether the evidence was altogether sufficient, I am not prepared to say the mortgage deed or any contemporaneous conduct was so inconsistent with that finding as to warrant this Court in differing from it, and we must therefore accept it as concluding the matter.

Then it is said there is no mortgage; and that this is so according to Greek law the appellant has in my opinion conclusively established. But it does not follow therefrom that the mortgagee had no insurable interest; whether he had or not depends not upon what his position might have been had he attempted to perfect his security according to Greek law, but upon what his position was under the deed of September 13, 1920, and by virtue of that deed, construed as it undoubtedly must be by the law of this country, he obtained a good equitable charge over the whole of the owner's interest in the ship. It is, therefore, impossible to sustain the argument that he had no insurable interest on and after the date of that deed.

These matters disposed of, there remain two grounds upon which the appellant relies—the first the one I have already indicated, that the loss was not brought about by a peril insured against, and the second that the policy was avoided by a breach of warranty of which the mortgagee had notice when he accepted the policy. Upon the first of these points it has been strenuously contended that *Small's Case* (1) in the light of more recent and authoritative pronouncements, and having regard to the restricted issue there presented to the

(1) [1897] 2 Q. B. 311.

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Court and the apparent absence of any argument by counsel on the larger question, ought not to be treated as finally deciding, so far as this Court is concerned, that a loss due to the incursion of sea water is a peril insured against in a case where the proximate or dominant cause is really the felonious act of the owner and not the incursion of sea water. Put in this way the argument would seem rather to beg the question, which I take to be, Which is the proximate or dominant cause—the felonious act of the owner or the incursion of sea water ?

I cannot bring myself to hold that *Small's Case* (1) does not cover the point argued in this case. I think the Court did there decide that a wrong done to the ship by reason of which the sea had got into the ship and she had been sent to the bottom, was a loss by perils of the sea for which an innocent mortgagee could recover. In substance we are invited to decide the same point in a contrary sense, and the invitation, in my opinion, is one which a well settled and salutary rule prevents our accepting. If the contrary sense is to be established it must be by the final appellate tribunal.

The second point involves questions of fact and construction. The policy sued upon incorporates the Institute Time Clauses, by which certain limits are imposed on the amount insured (inter alia) on freight for account of the assured. It was proved at the trial that an insurance for six months on freight for 27,500*l.* was effected for the benefit of the mortgagee. This was 13,750*l.* in excess of the limit and prima facie was a breach of the warranty. But it was argued —and the learned judge below adopted the argument—that inasmuch as the excessive policy was an insurance against war risks and was not therefore one on which a marine risk underwriter could suffer any loss, it could not be treated as a breach of the warranty contained in the marine risk policy. I cannot agree with that view. It introduces into the policy we have to deal with an exception or qualification which is not to be found therein and which certainly ought not to

(1) [1897] 2 Q. B. 311.

be implied in the absence of language justifying the implication, seeing that the limits are imposed with the intent to prevent over-insurance and the consequent temptation to malpractices.

I agree with the other members of the Court that there was here a breach of warranty which affords an answer to the claim of the mortgagee, and in my opinion the appeal must be allowed and judgment in the action be entered for the defendant with costs here and below.

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BANKES L.J. By a policy of marine insurance dated June 15, 1920, the appellants insured the steamer *Ioanna* for twelve months from May 29, 1920, in the sum of 15,000*l.* against (inter alia) perils of the sea. The *Ioanna* was totally lost on February 19, 1921. The present action was brought by the respondents claiming to be fully interested in the said policy as mortgagees. The learned judge who tried the action found that the *Ioanna* had been scuttled with the connivance of her owner. As a result of this finding a number of important and interesting questions were raised and discussed both in the Court below and in this Court. There is one question, however, which goes to the root of the respondents' claim and that is the question whether the respondents were parties to the contract of insurance. The learned judge held that they were. If his decision on this point cannot be supported the claim must fail and it becomes unnecessary to consider any of the other points which were raised. The facts material to this issue need careful consideration. They appear to be as follows: The *Ioanna* was one of a number of vessels which were built by Messrs. Doxford, of Sunderland, for a Greek owner of the name of Angelis. While building the vessel was known as No. 540. The respondents had financed the building of these vessels, and the course of business between them and the owner was that as advances were made during building, charges were

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given, and eventually a mortgage agreement was entered into under which the owner undertook to execute a first mortgage of the vessel according to the Greek law, it being intended that the vessel should be registered under the Greek flag. The mortgage agreements appear to have all been in the same or substantially the same form, and the only material provision which for present purposes need be referred to is that the mortgagor was under an obligation to insure, and provisions were inserted securing that the mortgagee should take a derivative title to the policies from the mortgagor. One passage from clause 8 of the agreement needs to be quoted. It is in these terms. "All policies of insurance on which the premiums have been fully paid over the hull, machinery, and appurtenances of the said steamship shall be suitably indorsed in favour of the mortgagees and shall be lodged either with them along with the mortgage or with Messrs. J. W. Hobbs & Co. on their behalf in which event the said Messrs. Hobbs shall address to the mortgagees a letter stating the details of the policies and acknowledging that they are held to the order and on behalf of the mortgagees." The Messrs. Hobbs & Co. referred to in this clause are insurance brokers who effected the insurance in question upon the instructions of a Mr. Mango. This gentleman held a power of attorney from the Greek owner, and acted for him in all the business connected with the building and insurance of these vessels. It appears that while building, and while on her trial trip, the *Ioanna* was covered by the builders' policy, and that the charges which had been given covering advances from the respondents for her building had been silent on the question of insurance. In May, 1920, Mr. Mango got into communication with Messrs. Hobbs in reference to the insurance of the vessel, the proposal being to take out a twelve-months' policy against marine risks, and a six-months' policy against war risks. On May 12 Mango wrote to Hobbs & Co. telling them that the twelve-months' insurance was to commence as from the arrival of the vessel in Smith's Dock, unless advised to the contrary. On the same day Mr. Psimenos wrote to the respondents

telling them that he was preparing the necessary documents for the mortgage of the *Ióanna* and that they would be in the same form as those in the case of the *Theone*. On May 18, 1920, Messrs. Hobbs wrote a letter to the respondents' representatives in London in the following terms: "Messrs. Graham & Co., 5 Bishopsgate St. Dear Sirs, s.s. *Ioanna*. We beg to advise you that we have effected the insurance on the above vessel for 12 months from date to be advised, on hull and machinery valued 275,000*l.* as follows." They then state how it is divided and then they go on: "At the request of our client Mr. J. A. Mango, we agree that we are holding the policies to your order to the extent of your interest in the vessel, subject to our lien for unpaid premiums and to having the right to cancel the policies should the premiums not be paid, it of course being understood that we should not so act without first advising you." In this letter Messrs. Hobbs speak of Mr. Mango as their client, and it is only reasonable to suppose that the letter took the form it did because Mr. Mango treated the transaction as one which, following the usual course of business, would be covered by the mortgage agreement and by clause 8 of that agreement. This letter appears to have been the only communication on the subject of the insurance of the vessel passing between Messrs. Hobbs and the respondents or their representatives. On May 19 Messrs. Hobbs wrote to Mr. Mango informing him that on his instructions they had arranged with underwriters that the twelve-months' insurance should commence as from the sailing from the Tyne, date to be declared. On May 31 Mr. Mango wrote to Messrs. Hobbs telling them that the *Ioanna* sailed at 2.40 on the 29th.

Messrs. Hobbs accordingly had the policy prepared. It is dated June 15, 1920; it is made out in the somewhat unusual form, "Whereas J. W. Hobbs & Co., $\frac{\text{and}}{\text{or}}$ as agents have represented that they are interested in or duly authorized as owner or agent to make the insurance hereinafter mentioned," which was for a period of twelve months from noon on May 29, 1920. The mortgage agreement was executed on July 28, 1920. On the documents as they stand

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there does not appear to me to be any trace of any intention on any one's part to take out the policy to cover the separate interest of the mortgagees. The clear intention, as expressed in the mortgage agreement, was that the interest of the mortgagees should be a derivative interest and not an independent separate interest. It is true that the policy appears never to have been indorsed, but this I look upon as an oversight. The terms of the letter of May 18 of Messrs. Hobbs to Messrs. Graham appear to me decisive as to what Mr. Mango's view at that time was. Had the matter rested there I should have been prepared to hold that the respondents had failed to prove that they were parties to the contract of insurance. What occurred at the trial confirms this view. Witnesses were called from the respondents' and from Messrs. Graham's employ; they are silent on any question of instructions either to Mr. Mango or to Messrs. Hobbs to insure the separate interest of the mortgagees. Both Mr. Wright and Mr. Raeburn (1) during the trial called pointed attention to the necessity of calling evidence to prove the respondents' case on this point. Finally Mr. Hobbs was called as a witness, as a result of an objection that the letters passing between his firm and Mr. Mango and his firm and Messrs. Graham had not been proved. In examination in chief he said nothing really material to the point. In cross-examination by Mr. Claughton Scott as to the war risk insurance he was unable to say that he had received any instructions to insure for any one except for Mr. Mango. His re-examination was confined to the following questions and answers: "(Q.) You have told us that when Mr. Mango instructed you you knew that Mr. Angelis was the owner and you knew that there were mortgagees? (A.) That is so. (Q.) When you insured whom did you intend to cover? (A.) Whosoever might be concerned. (Mr. Douglas Hogg): Thank you, Mr. Hobbs, that is all I want to ask you." This evidence, given after warning, is to my mind extremely significant. The intention of this witness is, according to all the authorities, quite

(1) Raeburn K.C. appeared for war risk underwriters who were also defendants, but for whom judgment was given at the trial.

irrelevant: *Boston Fruit Co.* v. *British and Foreign Marine Insurance Co.* (1); *Small's Case* (2), per Mathew J. It is the authority of this witness which is all-important. He could have spoken to this had he received instructions from Mr. Mango. Mr. Mango might have been called. Some one from the respondent company, or from Messrs. Graham's, might have been called. The absence of any evidence on the point is very significant. It would appear from the judge's note that Mr. Mango was in Court and acted as interpreter, but I am not sure as to this, and attach no importance to it. Under these circumstances I find what appears to me to be not only an entire absence of affirmative evidence in support of the respondents' case that they were parties to the contract of insurance, but evidence which points strongly to the opposite conclusion. For these reasons I am unable to agree with the view taken by the learned judge. I think that the respondents failed in making a foundation for their claim, and under these circumstances the appeal must be allowed and the judgment must be set aside and entered for the appellants with costs here and below.

SCRUTTON L.J. In this case the owner has been found to have been privy to the scuttling of the ship, and has not appealed. The question is whether the innocent mortgagee can recover on the policy. If the owner had sued, he would have been prevented from recovering, if for no other reason, by the provisions of s. 55, sub-s. 2 (*a*), of the Marine Insurance Act. As to the mortgagee, two questions arise. (1.) Does he prove a loss either by perils of the sea, barratry, or the general words, or are we bound by the decision of this Court in *Small's Case* (3) to hold that he does prove such a loss? On this general question I have expressed my view in *Samuel's Case* (4), and I adhere to that view. The mortgagee fails on that ground. (2.) The further question is this. If the mortgagee's title is a derivative one from the mortgagor, he is liable to any defences available against the mortgagor, and

(1) [1906] A. C. 336, 339.
(2) [1897] 2 Q. B. 42, 45.
(3) [1897] 2 Q. B. 311.
(4) Ante, p. 617.

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therefore fails in this action in which the mortgagor is prevented by his misconduct from recovering. But if the policy was taken out so as to give the mortgagee a direct contract, independent of the mortgagor, he is not affected by a defence available against the mortgagor, but can succeed if he proves a loss by perils insured against. As stated above, I think he does not; but I proceed to consider this case on the assumption that my view is erroneous, and that scuttling by the owner was, as against a stranger with an insurable interest who could sue on the policy, a loss by perils of the sea. The test whether a person with an insurable interest at the time of the loss can sue on the policy is correctly stated in Arnould, § 173, in these words (1): "The true rule, then, would appear to be, that any party to whom an interest in the property insured 'doth, may, or shall appertain' at any time during the pendency of the risk, may, under the general words, by subsequent adoption, take advantage of the policy to protect such interest, if it appears from extrinsic evidence that the person directing the policy to be effected intended at the time to protect this particular interest, or at any rate to protect the interests generally of the parties who should ultimately appear to be concerned. The onus of proving that the plaintiff's interest was intended to be insured under these general words is on him."

This is the result of the decision of the House of Lords in the *Boston Fruit Case*, (2) and of the Privy Council in *Yangtsze Insurance Association* v. *Lukmanjee*. (3) The material evidence is as to the intention of the person giving the instructions to effect the insurance, not of the broker who carries out the instructions: see per Mathew J. in *Small's Case*, (4) and by Vaughan Williams L.J. in the *Boston Fruit Case*. (5) In the present case the person who gave instructions to effect the insurance was one Mango, acting under a power of attorney from the owner, who gave instructions to brokers, Messrs. Hobbs & Co. The original

(1) 10th ed. (1921), vol. i., p. 240.
(2) [1906] A. C. 336.
(3) [1918] A. C. 585.
(4) [1897] 2 Q. B. 42, 45.
(5) [1905] 1 K. B. 637, 648.

slip was initialled at the end of November and beginning of December, 1919. It was for a twelve-months' policy, but the date of the commencement of the risk was not filled in. It ran "*Ioanna*"—(an illegible hieroglyphic)—"new steamer Angelis." At that time, as appears from the charge of December 1, 1919, there was a Ioanna Steamship Company owning the *Ioanna*, and there was a second steamer building in Doxford's Yard, called No. 540. The first *Ioanna* was under mortgage to the plaintiffs. It appears from the correspondence, p. 35, that before March 20, 1920, the first *Ioanna* was sold and released from the mortgage, the steamer *Theone* being substituted as security. At some time not proved the name *Ioanna* was given to steamer No. 540; the first *Ioanna* having presumably changed her name on sale. In May, 1920, the slip that had been initialled in November, 1919, was completed by insertion of a date of commencement of risk, which was initialled by a number of underwriters, and I assume that whatever the insurance was at first, it was in May on the second *Ioanna*. In May the plaintiffs had two charges on No. 540, dated respectively December 1, 1919, and March 10, 1920. These charges on the ship did not expressly mention insurance, but included an agreement to execute a mortgage in a form and with covenants dictated by the mortgagees. No such mortgage was executed till July 28, 1920, but the form was one which was being used all through 1920 by the owner and mortgagees in the case of other ships. Clause 8 of the form provided that the steamer should be insured and kept insured at the expense of the owner; that all policies of insurance should be suitably indorsed in favour of the mortgagees, and that the policies should be lodged with the mortgagees, or with Messrs. Hobbs, the brokers, on their behalf, in which latter case the brokers should write a letter acknowledging that the policies were held to the order and on behalf of the mortgagees. By the last clause of the form the owner appointed the mortgagees to be his irrevocable attorneys "To sue on the policy in his name." It is true this agreement was not executed till July, 1920, but when the policy sued on was handed to Messrs. Hobbs in

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May they wrote a letter to the mortgagees in the exact words of clause 8, and all parties obviously took it as the form of the mortgage agreed to be executed. We have no correspondence produced or evidence as to the slip in November, 1919, nor is the cover note produced. The instructions in May, 1920, came to Hobbs from Mango, and are in writing. The policy itself is not in the very usual form, "Hobbs & Company as well in their own name as for and in the name of every person or persons to whom the same doth, may, or shall appertain," but are in the Merchants' Marine form, "Hobbs & Co. and/or as agents." For some reason which I do not understand the mortgagees' counsel either did not appreciate the necessity of proving or did not wish to prove whom Mango intended to insure. They did not call any one to prove who was the principal till after all the evidence and speeches were closed, and then they only called the broker, whose intention was immaterial on the authorities. He said he intended to cover whosoever might be concerned. Mango, whose intention was material, was not called. An application was made to us to allow him now to be called. We did not accede to the request, and personally I should think his evidence of concealed intention, given at a time when from full argument it was quite clear what intention was necessary for success, quite unreliable unless corroborated by contemporary documents, none of which have been produced.

I have come to the conclusion that the intention of the mortgagees' attorney giving the instructions was to insure on behalf of the mortgagor, the mortgagees' interest being protected by an assignment of or a charge on the policy, and an irrevocable power of attorney to sue on it in the name of the mortgagor. I think that there were not two separate insurances, one by the mortgagor who could, it was agreed, sue on it for the whole amount, and one by the mortgagees to the amount of their mortgage debt, but one insurance by the mortgagor intended to cover the interest of the mortgagees by assignment and an irrevocable power of attorney to sue in the mortgagor's name. If this is the true finding the

mortgagees' title is that of the mortgagor, and their claim is defeated by the mortgagor's misconduct.

I should, had it been necessary, have decided this point in *Samuel's Case* (1) the other way, for there the insurance was effected by the mortgagees' broker on the joint instructions of mortgagor and mortgagees, the policy being retained by the mortgagees' broker. I think, though it is not necessary to decide it, that I should hold that the mortgagees had an insurable interest, having a right to have a valid Greek mortgage on the ship, if she had survived, and probably having rights over her by English law.

It is unnecessary to deal with the complicated questions which have been argued on consolidation and the amount to be recovered, which will be available elsewhere should the grounds on which this judgment is based be held to be mistaken.

The appeal must be allowed and judgment entered for the appellants with costs here and below.

EVE J. On February 19, 1921, according to that part of the judgment in this action against which no appeal has been lodged, the steamship *Ioanna* was wilfully thrown away by some of her crew with the assent and on the authority of her owner. At the date aforesaid the ship was insured against the ordinary marine risks for a sum of 275,000*l.*, and the defendants appeal against so much of the judgment as adjudged the plaintiffs entitled to recover against them the sum of 15,000*l.*, their subscription to the policy by which the insurance was effected. The judgment, so far as it is under appeal, is based, first, upon the finding that the plaintiffs were parties to the contract of insurance, and secondly, upon the learned judge's conclusion that as mortgagees—innocent of any participation in the throwing away of the ship—they are entitled by virtue of the decision of this Court in *Small's Case* (2) to recover for a peril insured against notwithstanding that the incursion of sea water by which the ship was sunk was

(1) Ante, p. 617. (2) [1897] 2 Q. B. 311.

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due to the felonious act of the owner. As already indicated in my judgment in the case of *P. Samuel & Co.* v. *Dumas* (1) I take the same view of the effect of the decision in *Small's Case* (2) as the learned judge below did, and were that the only ground of appeal I should hold that this appeal failed.

But there is also the contention that not only was no evidence produced at the trial to prove that the plaintiffs were parties to the contract of insurance, but that on the contrary there were materials before the Court which are more consistent with their title being that of assignees than of parties to the contract. It is not necessary for me to recapitulate the facts. Although, as will have been gathered from what has already been said, the earlier history of the plaintiffs' connection with this particular ship was not made very clear, this much may be taken to have been established, that in May, 1920, they had an insurable interest under an equitable charge and that by the terms of that charge the ship was to be insured by and at the expense of the owner against all risks to the extent of the outstanding loan, and that the policies were to be indorsed in favour of the mortgagees and lodged either with them or with Messrs. J. W. Hobbs & Co. on their behalf, in which latter event Hobbs & Co. were to address to the mortgagees a letter stating details of the policies and acknowledging that they were held to the order and on behalf of the mortgagees. The mortgagees were also thereby appointed the true, lawful, and irrevocable attorneys of the owner for him and in his name to ask, demand, sue for, and recover all insurance moneys under any policy and to give proper receipts and discharges for the same. In this condition of things the contract of insurance was concluded by Hobbs & Co. as brokers on the instructions of the owner's attorney, Mr. Mango. It was a twelve-months' policy, the risk under which was ultimately fixed to commence at noon on May 29. Before that date Hobbs & Co. addressed to the plaintiffs' agents, Messrs. Graham & Co., the letter of May 18,

(1) Ante, p. 625. (2) [1897] 2 Q. B. 311.

which has already been read by my Lord. It is impossible to dissociate that letter from the provisions of the equitable charge already referred to, and the two documents read together are wholly consistent with an insurance by the owner and an assignment of the benefit of that insurance to the mortgagees. The policy dated June 15 throws no further light on the matter, but the subsequent document bearing date July 28, which constitutes the security upon which the plaintiffs' rights as mortgagees are sought to be enforced, reproduces in substance the provisions relating to the insurances contained in the equitable charge it superseded. On the documents there is nothing to show that any of the parties ever contemplated the insurance of the interest of the mortgagees as distinct or apart from that of the owner; on the contrary the intention to be gathered from the documents is an intention that the owner will insure and assign the benefit of the insurance to the mortgagees. Was this apparent intention negatived by any evidence produced at the trial? I do not think it was. No evidence was produced as to the intention of the owner or his attorney, Mango, or as to any instructions from the latter to Hobbs & Co. at variance with the conclusion to which an examination of the documents compels. I cannot attribute the absence of this evidence to any oversight on the part of the plaintiffs' advisers in the face of the repeated expressions of intention on the part of counsel arguing on behalf of both defendants to rely upon the defence that the mortgagees stood in no better position than the owner. I think its absence can only be accounted for by the fact that it was not obtainable.

In these circumstances I think the plaintiffs altogether failed to prove that they were parties to the contract of insurance, and that their action to recover on the policy could not succeed for want of such proof. As this conclusion must result in the reversal of the judgment below it becomes unnecessary to determine how far the plaintiffs if entitled to judgment could have recovered on the footing of their being entitled to consolidate their advances on the *Ioanna* with a debt due to them on the security of another ship belonging

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to the same owner which in fact had ceased to be a security available for the plaintiffs or capable of being redeemed when the *Ioanna* was cast away.

I agree that the appeal must be allowed and the action be dismissed with costs here and below.

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Appeal allowed.

Solicitors for appellants: *William A. Crump & Son.*
Solicitors for respondents: *W. & W. Stocken.*

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Appeal allowed.

Solicitors for appellants: *Pritchard & Sons.*
Solicitors for respondents: *Thomas Cooper & Co.*

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COMMISSIONERS OF CHURCH TEMPORALITIES IN WALES *v.* GUSTARD AND ANOTHER.

[1922. C. 2437.]

Rates—Sewers Rate—Tithe Rentcharge—Rateability—23 Hen. 8, *c.* 5——*Welsh Church Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 91), *ss.* 8, 15—*Welsh Church (Temporalities) Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 65), *s.* 4.

Tithe or tithe rentcharge vested in the Commissioners of Church Temporalities in Wales under the Welsh Church Act, 1914, is no longer property devoted to sacred uses, and is therefore liable to all rates, including sewers rate, to which any other hereditament is liable.

SPECIAL CASE stated by consent pursuant to Order 34.

The plaintiffs (who were a body corporate appointed and acting under the Welsh Church Acts, 1914 and 1919) by their writ in the action having claimed damages from the defendants for improperly distraining, the parties concurred in stating the following question for the opinion of the Court: Whether

in law the plaintiffs were liable to pay to His Majesty's Commissioners of Sewers for the Levels of the Hundreds of Caldicot and Wentlooge, in the county of Monmouth, sewers rates assessed by those Commissioners in respect of tithes or tithe rentcharges issuing out of lands in the parish of Whitson in the said county and vested in the plaintiffs, the said tithes or tithe rentcharges having not yet been transferred by the plaintiffs in accordance with the provisions of the Welsh Church Act, 1914, s. 8, as amended by the Welsh Church (Temporalities) Act, 1919, s. 4.

The lands out of which the tithe rentcharges issued derived benefit from the performance of their duties by the Commissioners of Sewers, who assessed the plaintiffs to a sum of 14*l.* as a rate under the Land Drainage Act, 1861, and other Acts. The lands themselves out of which the tithes or tithe rentcharges issued were duly assessed to the sewers rate.

As the plaintiffs refused to pay the sum so assessed the Commissioners, after taking the proper steps, issued a distress warrant authorizing the defendants (who were respectively their clerk and bailiff) to levy the said sum, and, acting under that warrant, the second defendant seized certain chattels belonging to the plaintiffs, who thereupon brought this action.

It was admitted, for the purposes of the case, that the assessment and rate were properly made, that the necessary steps to enforce the rate by distress were properly taken, and that the amount recoverable was 14*l.* and 14*s.* costs.

It was contended for the defendants, and denied by the plaintiffs, that an assessment could legally and effectively be made on the plaintiffs for the sewers rate in question.

J. B. Matthews K.C. and *Leonard* for the defendants. It is submitted that tithes, even when in ecclesiastical hands, are liable to sewers rate; in any event, they are liable when in lay hands. The Bill of Sewers (23 Hen. 8, c. 5), which made perpetual the provisions of the earlier statutes on the subject, is in the widest terms, and imposes the liability to sewers rate on all persons within the particular district "after the quantity of their lands tenements and rents."

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In *Rooke's Case* (1) it is said that the Commissioners of Sewers ought to tax equally all who are in danger of being damnified by the non-repair of banks, etc. That tithes are prima facie "tenements" is established by *Rex* v. *Skingle* (2); *Rex* v. *Ellis* (3); and *Reg.* v. *Nevill* (4), although no doubt, as was held in the last cited case, this construction may be excluded by the ejusdem generis rule; and it is clear from *Webb* v. *Batchelour* (5) that the clergy are liable to all public charges imposed by Act of Parliament; see, too, to the same effect Phillimore's Ecclesiastical Law, 2nd ed., vol. i., p. 477, although it is true that in vol. ii., p. 1378, of the same work it is stated that "it does not seem a settled point whether tithe, or rentcharge in lieu of tithe, is liable to be rated by the Commissioners of Sewers." In Callis on Sewers, 4th ed., divergent views are expressed in the text and in a footnote on p. 159; but in Wood's Institute of the Laws of England, 4th ed., published in 1728, it is said (p. 176) that "tithes are at this day chargeable with all payments imposed by Act of Parliament, if they are not excepted. They are subject by statutes to contribute to the poor, maimed soldiers, King's Bench and Marshalsea prisons, the militia, highways and bridges, watch and ward, constables' rates, robberies committed in the hundred, and are liable to be taxed by Commissioners of Sewers, &c., though they were not subject to any temporal charges at common law." That, it is submitted, is the true view, for the intention cannot be imputed to the Legislature to exempt one-tenth of the property deriving benefit from the works constructed by the Commissioners of Sewers. Moreover, the liability of tithes to all public charges is recognized by s. 69 of the Tithe Act, 1836.

In any view, it is clear that tithes or tithe rentcharges in lay hands are liable to sewers rates: Callis on Sewers, 4th ed., p. 158. The tithe rentcharges in the hands of the plaintiffs —who are a lay corporation: *Irish Land Commission* v. *Grant* (6)—are not property devoted to sacred uses. The

(1) (1597) 5 Rep. 99b.
(2) (1718) 1 Stra. 100.
(3) (1816) 3 Price, 323.
(4) (1846) 8 Q. B. 452, 463.
(5) (1674) 1 Vent. 273.
(6) (1884) 10 App. Cas. 14.

effect of the Welsh Church Act, 1914, on the tithes is precisely the same as that effected on the dissolution of the monasteries.

Greene K.C. and *Rewcastle* for the plaintiffs. No case has decided that tithes or tithe rentcharges, whether in ecclesiastical or lay hands, are liable to sewers rates. The exemption given to tithes is due to the nature of the property. In Magna Charta (9 Hen. 3, c. 14) it is said that "no man of the Church shall be amerced after the quantity of his spiritual benefice, but after his lay tenement, and after the quantity of his offence": see also Fitzherbert's Natura Brevium, 9th ed., p. 227. Express words were necessary to tax ecclesiastical property: Godolphin's Repertorium Canonicum: or An Abridgment of the Ecclesiastical Laws, 3rd ed., p. 194. Callis on Sewers, 4th ed., p. 158, clearly supports the view now contended for, his opinion being based on the distinction between the nature of spiritual and temporal property; see also to the same effect Herne's Reading Concerning Commissioners of Sewers (1659), and Woolrych's Law of Sewers, 3rd ed., p. 111. The editorial footnote to Callis, 4th ed., p. 159, taken from the edition of 1685, where the view is expressed that tithes, even in ecclesiastical hands, are rateable by the Commissioners of Sewers, "for it was resolved 5 Car. 1 by all the judges of England, (as Sir Nicholas Hyde, heretofore Chief Justice of the King's Bench reported,) that tithes are at this day chargeable with all charges imposed by any Act of Parliament, wherein they are not particularly excepted, as upon the statute of 43 Eliz. to the poor, to maimed soldiers, King's Bench, Marshalsea, bridges, &c. Parson's Counsellor, Pt. II., c. 15," is incorrect, as Hyde C.J. did not say what is there attributed to him. Degge in his Parson's Counsellor (edition of 1703) sets out what he terms the resolution of the judges, but the only resolution to be found in the reports is that stated in *Webb* v. *Batchelour* (1)—namely, that "the clergy are liable to all public charges imposed by Act of Parliament." That case does not touch the point now in question and is the source of the many inaccuracies that appear in the text-books. Shelford in his Law of Tithes, 3rd ed., p. 46, frankly

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says that on the point whether tithes in the hands of the clergy are rateable by the Commissioners of Sewers he can give no exact information; while in Kennedy and Sandars' Law of Land Drainage and Sewers, p. 114, the opinion is indicated that tithes are rateable, but the reasoning on which that opinion is founded rests upon a complete misapprehension, and moreover the statement there made cannot outweigh the clearly expressed view to the contrary of Callis, Comyns (see Digest, tit. Sewers, E. 5), and Herne, all of whom wrote at a time when men's minds had not become secularized.

[GREER J. Did not the ground for the exemption of tithes from rateability immediately cease when tithes got into lay hands?]

What was spiritual property was always outside the purview of the Bill of Sewers.

Assuming that Callis is right both when he says that tithes in ecclesiastical hands are not, but that in lay hands they are, liable to sewers rates, nevertheless the present plaintiffs are entitled to succeed. Sect. 69 of the Tithe Act, 1836, shows that tithe rentcharge is only liable in the like manner as tithes formerly were. Here the tithes in the hands of an incumbent were clearly not liable. Again, the Welsh Church Act, 1914, merely effects a transfer from the incumbent to the Commissioners and does not have the effect of increasing the burdens on the property transferred. Sect. 15 of the Act, which provides for compensation to be made to owners of tithe rentcharge, shows that the rentcharge was not intended to be subject to greater burdens in respect of rates after the transfer than it was before.

J. B. Matthews K.C. in reply. It is not correct to say that tithes have not been taxed. Under 43 Eliz. c. 2 parsons were taxed and their tithes were taken as the measure of their liability. The immunity of the clergy in respect of their spiritual goods existed only to this extent, that a judgment creditor could not levy execution by putting in the Sheriff; in such a case, the writ went to the Bishop, as it does to this day, the process of execution being by sequestration.

Cur. adv. vult.

Feb. 19. GREER J. read the following judgment: This special case stated by the parties to this action pursuant to Order 34 raises an important and difficult question with regard to the liability of the plaintiffs to be assessed by the Commissioners of Sewers in respect of tithe or tithe rentcharges which issue out of lands in the parish of Whitson in the county of Monmouth. The exact question to be decided is stated in para. 1 of the special case as follows: "Whether in law the plaintiffs were liable to pay to his Majesty's Commissioners of Sewers for the Levels of the Hundreds of Caldicot and Wentlooge, in the county of Monmouth, sewers rates assessed by those Commissioners of Sewers in respect of tithes or tithe rentcharges issuing out of lands in the parish of Whitson in the said county and vested in the plaintiffs, the said tithes or tithe rentcharges having not yet been transferred by the plaintiffs in accordance with the provisions of the Welsh Church Act, 1914, s. 8, as amended by the Welsh Church (Temporalities) Act, 1919, s. 4."

It was argued in support of the liability of the plaintiffs, (1.) that all persons who are entitled to receive tithe rentcharge, whether ecclesiastical or lay, are liable to be assessed for sewers rate in respect of such tithe rentcharge; (2.) that in any event all laymen in whom tithe rentcharge is vested are liable to sewers rate in respect of their tithes; and (3.) that the plaintiffs are a lay corporation, and so long as they are entitled to collect tithe rentcharge they are liable to be rated in respect thereof. Each of these propositions was denied on behalf of the plaintiffs.

I have had an opportunity of consulting the various cases cited in argument, and the many text-books referred to. I have also made a search of my own to see whether I could discover any guidance in decisions or text-books which had escaped the attention of counsel. My search did not provide me with any additional materials for coming to a decision on the question under consideration.

The liability to be assessed to sewers rate in respect of the Levels of the Hundreds of Caldicot and Wentlooge in the county of Monmouth does not arise under any Act of

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Parliament specially directed to this locality, but depends on the general Act of Parliament relating to Commissioners of Sewers (23 Hen. 8, c. 5), which was the last of a series of Acts which go as far back as 6 Hen. 6, c. 5, under which Commissioners of Sewers were appointed. These statutes provided for the appointment of commissioners to undertake the maintenance and repair of sewers or watercourses, and gave the commissioners power to meet their expenses by assessing and charging (inter alios) all persons who have, or may have, any benefit from their operations, or any detriment from the want of adequate drainage or repair of sewers or watercourses. The above seems to me to be a correct paraphrase of the charging part of the statutes.

In considering whether the clergy are liable to be rated in respect of the benefit they derive from the operations of the Commissioners through their receiving more by way of tithes than they would otherwise have received, it is desirable to treat the problem as involving two questions; first, does the statute apply to ecclesiastical persons at all; secondly, if the statute does apply to ecclesiastical persons, does it make them liable to be assessed and charged in respect of their tithe? There was a good deal of difference of opinion in the early days whether the general words of an Act of Parliament imposing burdens applied to ecclesiastical persons if they were not specially exempted, or whether such statutes only applied to them if they were expressly mentioned. In Phillimore's Ecclesiastical Law, 2nd ed., vol. i., p. 477, it is said: "Anciently, indeed, it was holden, that clergymen are not to be burdened in the general charges with the laity of this realm, neither to be troubled or incumbered, unless they be specially named and expressly charged by some statute. But now the contrary doctrine prevails, that clergymen are liable to all charges by Act of Parliament, unless they are specially exempted." This statement is apparently adopted from Burn's Ecclesiastical Law: see s. 4 of the chapter on privileges and restraints of clergy. In Godolphin's Repertorium Canonicum: or An Abridgment of the Ecclesiastical Laws, 3rd ed., p. 194, it is laid down that "the clergy are

not to be burthened in the general charges with the laity of this realm, neither to be troubled, or incumbered, unless they be especially named and expressly charged by some statutes." Various instances are given of general charges that have never been enforced against parsons. There can be little doubt that this view prevailed once, but after the case of *Webb* v. *Batchelour* (1) it does not seem possible to dispute the proposition that parsons are bound by general Acts of Parliament, even though they are not specially named. Phillimore seems to have concluded from *Webb* v. *Batchelour* (1) that parsons were liable to sewer rate in respect of their tithes, though in another passage, vol. ii., p. 1378, he says it does not seem a settled point whether tithe or tithe rentcharge is liable to be rated by the Commissioners of Sewers. *Webb* v. *Batchelour* (1) seems to me to leave untouched the question whether parsons are liable to be rated in respect of their tithes or tithe rentcharge. They may indeed be, and I think they are, liable to be rated in respect of other benefits they receive from the work of the Commissioners of Sewers, but in my judgment they were not, and are not, liable to be rated in respect of any benefit their tithes or tithe rentcharge may receive from the work of the Commissioners. In the old pre-Reformation days, when the right to tithe originated and became firmly established, tithes were regarded not as the property of the individual rector or vicar who received them, but rather as the portion of the fruits of the earth devoted by divine law to the service of religion, it being impossible that religious services could be conducted throughout the country unless provision was made for the person or parson who represented locally the living Church to which all citizens belonged. I think that at the time when the powers of the Commissioners were created, tithes, which could only be held by ecclesiastical persons, were treated in law as a special form of property devoted to pious uses, and they were not dealt with as the individual property of the incumbent of the parish. It is impossible to find direct judicial authority for this proposition, but it seems to me supported by a section

(1) 1 Vent. 273.

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of Magna Charta, and it has the advantage of being in accordance with the opinion of so great an authority as Callis on Sewers. In Magna Charta, in the part which in 9 Hen. 3 is described as chapter 14, it is provided that "no man of the Church shall be amerced after the quantity of his spiritual benefice, but after his lay tenement, and after the quantity of his offence." This appears to me to indicate that ecclesiastical benefits such as tithes were not treated as part of the property of the ecclesiastical person answerable for his obligations. In any case I am prepared to base my judgment on the opinion expressed in the third Lecture of Callis on Sewers, 4th ed., p. 156, and adopted in Comyns' Digest, tit. Sewers, E. 5, and in Woolrych on Sewers, 3rd ed., p. 111. I also agree with the opinion expressed by Callis that tithes in the hands of laymen are liable to be rated. If, as I think, the exemption from rateability arose by reason of the fact that tithes in the hands of the clergy were regarded as devoted to the uses of religion, and were not personal benefits to the ecclesiastical person in whom they were vested, it seems to follow that once they got into lay hands and ceased to be devoted to religious purposes, they became, like any other property in the hands of a lay person, liable to be treated as part of his property for the purpose of rating under any statute which imposes rates upon such lay person in respect of his property.

The only point that remains for decision is whether the Commissioners of Church Temporalities in Wales are entitled to the same privileges as the clergy in respect of the tithes which are vested in them by the Welsh Church Act, 1914. By s. 8 of that Act it is their duty to transfer any tithe rentcharge which was formerly appropriated to the use of any parochial benefice to the council of the county in which the land out of which the tithe rentcharge issues is situate. Sect. 15 provides that persons who have existing interests in tithe rentcharge transferred to a county council are entitled to be paid, in substitution for and in satisfaction of such interest, the annual amount according to the septennial average for the time being of that tithe rentcharge, after

deducting such sum as may be allowed by the Welsh Commissioners for cost of collection, rates, and other outgoings. It may be contended that tithe rentcharge taken from an incumbent who is entitled to the payments mentioned in s. 15 is still property devoted to religious purposes, and has, therefore, the same freedom from rate as it had in the hands of the incumbent before it was transferred to the Commissioners, but I think this is not so. The rentcharge is no longer payable to the incumbent. Sect. 15 does not provide that it shall be held for him, but only provides for a substituted payment. As the substituted payment is based on a seven years' average, it may, in any one year, be a different sum from the rentcharge for that year. The Commissioners do not hold the tithe rentcharge in trust for the existing incumbent; the latter is merely entitled to an annual sum by way of compensation for the loss of his tithe rentcharge.

I am also of opinion that the Commissioners of Church Temporalities in Wales are a lay corporation. If any authority is needed for this proposition it will be found in the case of the *Irish Land Commission* v. *Grant.* (1) The tithe rentcharge in their hands is no longer property devoted to sacred uses, and it is liable to all rates that any other hereditament is liable to.

The result is that I hold that the Commissioners of Church Temporalities in Wales are liable to be assessed and charged in respect of the tithes or tithe rentcharges vested in them which they have not yet transferred to the county councils. I answer the question put in the case in the affirmative, and direct that judgment be entered in the action for the defendants for 14*l.* 14*s.*, and the costs of, and incident to, this action, and special case.

Judgment for defendants.

Solicitors for plaintiffs: *Deacon & Co.*

Solicitors for defendants: *Taylor, Rowley & Lewis, for W. S. Gustard, Newport, Monmouth.*

(1) 10 App. Cas. 14.

J. S. H.

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Oct. 30, 31; *Nov.* 1, 2, 24.

[IN THE COURT OF APPEAL.]

LA COMPAÑIA MARTIARTU *v.* THE CORPORATION OF THE ROYAL EXCHANGE ASSURANCE.

[1921. L. 2945.]

Insurance (Marine)—Perils of the Sea—Barratry—Scuttled Ship—Presumption of Loss by Perils of Sea—Evidence of Loss by other Causes.

In an action by a shipowner against underwriters on a policy of marine insurance there is a presumption of a loss by perils of the sea, when the insured ship having sailed out of port on an intended voyage has never been heard of again: *Green* v. *Brown* (1744) Stra. 1199. But when the insured ship having been lost the owner gives some evidence of a loss by perils of the sea and the underwriters offer a reasonable explanation of the loss and show that it was probably due to an event not insured against, for example the scuttling of the ship with the connivance of the owner, then, if the evidence leaves the Court in doubt to which cause the loss is attributable, the plaintiff fails to prove his case and the defendants are entitled to judgment.

Appeal from the judgment of Bailhache J. in an action tried before the learned judge without a jury.

The action was brought by the plaintiffs to recover a sum of 150,000*l.* upon a time policy of marine insurance against adventures and perils of the sea and barratry of the master and mariners upon the hull and machinery of their steamship *Arnus*, which they alleged was totally lost by perils insured against. The policy was subscribed in 1920 by the defendants to the amount of 10,000*l.* and covered the steamer from and after May 17, 1920, up to May 17, 1921. The defendants denied that the steamer was lost by any peril insured against. They alleged that she had been intentionally sunk by the captain and some of the crew with the connivance of the plaintiffs.

The plaintiffs were a Spanish corporation with a capital the equivalent of 100,000*l.* They had bought the steamer in May, 1920, when the value of shipping was very high, for 160,000*l.*, having borrowed 60,000*l.* to enable them to do this. There were other creditors of the plaintiff company, among whom was their managing director, one Juan de

Longaray. He was also a shareholder; of the 4820 shares of 500 pesetas each in the company he held 1240. The first and second mates, José Ybarra and Felipe Ybarra, were his stepsons. They and their seven brothers and sisters held between them 648 shares.

In April, 1921, the insurances on the steamer were the policy for 150,000*l.* on ship, the subject of this action, and a policy for 24,000*l.* on disbursements. These policies were about to expire on May 17. The value of the steamer had decreased to 14,000*l.*

At 9.30 P.M. on April 26, 1921, the steamer left Vivero on the north-west coast of Spain, a little north of Finisterre, bound for Rotterdam with a cargo of iron ore. She was commanded by one Tomas Encicudo with José Ybarra and Felipe Ybarra, who were his nephews, as first and second mate. Each mate held seventy-two shares, and the chief engineer Gomeza held eighty shares in the company. The captain held no shares. The proper and usual course should take a vessel clear of the lights south of Ushant at Armen Rock and Penmarch Point. The course set by the captain if prolonged would have taken the steamer ashore inside Armen Rock, an unusual course out of the track of ships passing from Finisterre to Ushant, but one which would bring her near to a fishing fleet in a bay south of Penmarch Point.

On the night of April 27, in fine weather with a smooth sea and little or no wind blowing, the steamer sank in deep water. She settled down by the head. There was no loss of life. The crew abandoned the ship three hours before she sank, and were found in their boats by the fishing fleet and taken on board. The ship's papers, including the log, were lost.

The plaintiffs' case was that the loss of the ship was due to her having come in contact with a floating mass of wreckage which stripped off a portion of her bilge keel, and that the sea water found its way into the ship through the holes where the rivets holding the bilge keel to the plates of the ship's side had been sheared off. This case depended

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upon the evidence of Felipe Ybarra, the second mate, who was the only one on board alleged to have seen the floating mass. His evidence if believed went far to confirm the evidence of the chief engineer, whom otherwise the learned judge did not regard as a reliable witness. The learned judge in his judgment said that he had formed a favourable opinion of the evidence of the second mate after seeing him in the witness box and hearing him give his evidence. This was an error made in the course of a long trial and uncorrected by counsel. The evidence of the second mate was taken on commission; he was not tendered as a witness at the trial. His evidence was that between 11.15 P.M. and 11.30 P.M. on April 27, standing on the port side of the bridge in good weather, starry and dark, he saw abaft the bridge about 20 ft. from the ship a dark mass some 2 ft. above water, which he estimated to be 75 ft. long and 24 ft. wide, looking like a hull or a large raft; that it seemed to him to pass clear of the ship; that he felt no shock and heard no noise, and kept his course.

The defendants' case was that the chief engineer had admitted the sea water deliberately by opening a valve in the valve-box in the boiler room and opening the sea inlet in the engine room; that the water was thus admitted into a ballast tank of which the port manhole cover was left loose or open; that the watertight doors failed to stop the water from passing into a cross bunker and thence into a hold in the fore part of the ship, and that this caused her to sink by the head.

The learned judge came to the conclusion that the steamer was lost through sea water entering the ship as the result of a collision, and accordingly he gave judgment for the plaintiffs. Towards the end of his judgment he said: "I agree that in a case of this kind when a ship goes to the bottom of the sea in calm weather on a fine night, although it is enough to make a prima facie case against the underwriters to say that she is at the bottom of the sea, yet very little evidence shifts the burden on to those who are claiming against the underwriters and imposes upon them the obligation of

showing what the particular peril was that sent her to the bottom of the sea, apart of course from the inrush of the water."

The defendants appealed.

The arguments of counsel on both sides dealt almost entirely with the question of fact whether the ship was lost through collision with floating wreckage as alleged by the respondents or through the wrongful act of the chief engineer and owners as alleged by the appellants. At the end of the argument the question arose whether, if each party in turn failed to convince the Court on their respective contentions, there was any presumption in favour of the respondents that the ship was lost by a peril of the sea. Upon this point

Dunlop K.C., *Langton* and *J. R. Ellis Cunliffe* for the appellants. The argument that the loss in this case was prima facie attributable to perils of the sea is based on a misapplication of the presumption in *Green* v. *Brown*. (1) Where a ship has sailed out of port on an intended voyage and has never been heard of again; where every one on board has presumably been drowned and no evidence is procurable, it may be unreasonable to expect the assured to prove with certainty what caused the loss. Moreover the proper and reasonable inference in those circumstances is that the ship was lost by perils of the sea. There is no fiction about such an inference; the presumption is in accordance with the facts of human experience. But that presumption is utterly inapplicable when the crew has not been lost and when the evidence of every member is available and that of many of them has been heard, weighed, and commented on. The case is then withdrawn from the region of presumption and becomes a question of fact to be decided upon the evidence direct or circumstantial before the Court; and if the Court is then left in doubt whether the plaintiff's view or that of the defendant is the true view, the same result follows in this as in every other case of disputed fact, namely that the plaintiff fails to prove his case. The decision of Lush J. in *Hurst* v. *Evans* (2) is an

(1) Stra. 1199 (2) [1917] 1 K. B. 352.

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example of the same principle. There the plaintiff was insured against loss of or damage to jewellery except loss by theft or dishonesty of his servants. He proved a case which tended to implicate one of his servants in a theft of the articles lost, and left the Court in doubt whether the servant had not stolen them; and Lush J. held that he had failed to prove his case. *Hurst* v. *Evans* (1) was discussed in *Munro Brice & Co.* v. *War Risks Association* (2), not very favourably; but it is submitted that it rests on a sound basis.

It is true that the irruption of sea water caused this ship to sink; but unless an irruption of sea water is a fortuitous accident or casualty it is not a peril of the sea: *Sassoon & Co.* v. *Western Assurance Co.* (3); *Mountain* v. *Whittle.* (4)

Stuart Bevan K.C. and *Sir R. Aske* for the respondents contended that if the Court was left in doubt the respondents were entitled to rely on the presumption that the vessel was lost by a peril of the sea. They cited *Hamilton & Co.* v. *Pandorf & Co.* (5); *Pickup* v. *Thames and Mersey Marine Insurance Co.* (6); *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.* (7) They also argued that complicity on the part of the respondents was not proved, and could not be proved against a corporation; and that the wrongful act of a part owner, if proved, did not debar his co-owners from recovering for a loss by barratry. On this point *Jones* v. *Nicholson* (8); *Mentz Decker & Co.* v. *Maritime Insurance Co.* (9); *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (10) were cited.

Langton in reply.

Cur. adv. vult.

Nov. 24. Written judgments were delivered consisting for the most part of an elaborate review of the facts and

(1) [1917] 1 K. B. 352.
(2) [1918] 2 K. B. 78. See *Munro Brice & Co.* v. *Marten* [1920] 3 K. B. 94.
(3) [1912] A. C. 561.
(4) [1921] 1 A. C. 615, 626.
(5) (1887) 12 App. Cas. 518, 528.
(6) (1878) 3 Q. B. D. 594.
(7) [1901] A. C. 362.
(8) (1854) 10 Ex. 28.
(9) (1909) 15 Com. Cas. 17, 24.
(10) [1915] A. C. 705, 713.

circumstances attending the steamer's loss, a consideration of the inferences sought to be drawn by the parties respectively, and a comparison of the degrees of probability reached by their respective explanations of the loss. The Court came to the unanimous conclusion that the steamer had been scuttled with the connivance of the respondents. It is not thought necessary to report that part of the case. Those portions of the judgment which deal with the point argued above are as follows :—

Bankes L.J. A point was raised at the end of the arguments of the counsel for the respondents upon what was, I think, erroneously referred to as the onus of proof. This I will deal with before referring to any of the facts. It arose in this way. Counsel was asked what the proper result would be assuming the Court, upon the whole of the evidence, was left in doubt as to whether the respondents had made out their case. The answer was that the Court must then fall back upon the presumption that, the vessel being a seaworthy vessel and having been lost by some unascertained peril, the peril must be presumed to be a peril covered by the policy. This contention is, in my opinion, quite untenable having regard to the facts in the present case. If the assured makes out a prima facie case, as the respondents in the present case did, then unless the underwriters displace that prima facie case the assured is no doubt entitled to rely upon the presumption. On the other hand, if the prima facie case, which was the foundation on which the presumption was rested, fails because the underwriters put forward a reasonable explanation of the loss, the superstructure falls with it. If both the assured and the underwriters put forward an explanation of the loss, the loss is not unexplained in a sense which would admit of the presumption, merely because the Court is unable to say which of the two explanations is the correct one. In my view of the facts of the present case, this conclusion disposes of this appeal because, having regard to the case made for the appellants in the Court below, I find it impossible to say

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that the respondents have established to my satisfaction that the loss of the vessel was due to a peril covered by the policy. I am unwilling, however, to rest my judgment entirely on this point, as the evidence has been exhaustively discussed, and I have formed a clear opinion upon it.

[The Lord Justice proceeded to consider the question of fact, and came to the conclusion that the vessel was deliberately scuttled with the connivance of the responsible managers of the respondent company. He concluded his judgment in these words :] Though in the result I differ from the conclusion arrived at by the learned judge, I cannot help feeling that, had he not been influenced by an unfortunate misapprehension in reference to the evidence of the second officer, he would have taken the same view of the facts as this Court is now taking. The appeal must be allowed with costs, and the judgment entered for the plaintiffs must be set aside and entered for the defendants with costs.

SCRUTTON L.J. gave at length his reasons for coming to the conclusion that the steamer had been scuttled rather than that she had been lost by colliding with floating wreckage, and proceeded :

Next, was the water admitted with the privity of the owner? When the owner is a company the privity must be that of the management, directors, or managing owner. This follows from the decision as to limitation of liability in *Smitton* v. *Orient Steam Navigation Co.* (1) and non-liability for fire in *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (2) I find the managing owner, Mons. Longaray, holding a large share interest in the capital of the company, and a considerable creditor, and the ship navigated by a captain, first, and second officers who are relations of Mons. Longaray and each other, and a chief engineer who is a shareholder. If then I come to the conclusion that one or all of these persons on board the ship were concerned in the intentional admission of water into the ship, I have no hesitation in finding that the admission of water was with the privity of

(1) (1907) 12 Com. Cas. 270, 277. (2) [1915] A. C. 705.

the managing owner, and therefore of the company who owned the ship.

This view renders it unnecessary finally to discuss the burden of proof, but in my present view, if there are circumstances suggesting that another cause than a peril insured against was the dominant or effective cause of the entry of sea water into the ship—see *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1)—and an examination of all the evidence and probabilities leaves the Court doubtful what is the real cause of the loss, the assured has failed to prove his case. The presumption may well be, when nothing is known except that the ship has disappeared at sea, that her loss was by perils of the sea: *Green* v. *Brown.* (2) But when, though it is known she has sunk, there is evidence on each side as to the cause of the admission of sea water, which leaves the Court in doubt whether the effective cause is within or without the policy, the plaintiff, the assured, fails, for he has not proved a loss by perils insured against. Not every loss by sea water is a peril of the sea, as is shown by the definition of that peril in the Marine Insurance Act: when there is evidence on each side suggesting the real cause the Court must determine on a balance of probabilities, as in every case of circumstantial evidence, and not be deterred from finding in favour of the stronger probabilities by the fact that some remote possibility exists the other way. In this case I find scuttling, but I do not think it is possible to put the case for the assured higher than by saying the matter is left in doubt, and if that be the true view in my opinion the assured fails. The appeal must be allowed with costs here and below.

Eve J. [after stating his reasons for agreeing with the other members of the Court that the ship had been scuttled, concluded as follows]: Finally I concur in the view that, in a case like this, where it cannot be said that the sinking of the ship was due to any unascertainable cause since it is demonstrated that she sank owing to the incursion of sea water, and where the evidence of every one who was aboard

(1) [1918] A. C. 350. (2) Stra. 1199.

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her is available for the trial, had the evidence left the Court in doubt on the question whether such incursion of sea water was due to a fortuitous casualty or a crime, the plaintiffs would not have been entitled to judgment, not having proved the material allegation in para. 2 of the statement of claim that "the steamer was sunk and was totally lost by perils insured against by the policy."

I agree that the appeal must be allowed and the action be dismissed with costs here and below.

Appeal allowed.

Solicitors for appellants: *Holman, Fenwick & Willan.*
Solicitors for respondents: *Botterell & Roche.*

W. H. G.

1923
Jan. 19.

E. HARDY AND COMPANY (LONDON), LIMITED *v.* HILLERNS AND FOWLER.

Sale of Goods—Sale by Buyer of Part of Goods—Failure to examine before Resale—Goods not in accordance with original Contract—Right of Buyer to reject—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *ss.* 34, 35, 36.

By a contract of sale the sellers agreed to sell to the buyers a quantity of Rosario and/or Santa Fé wheat shipped by steamship from a port or ports in the Argentine Republic and/or Uruguay. The vessel arrived at Hull, the port of discharge, on March 18, 1922, and reported on March 20. On March 21 the buyers, without having examined the wheat, resold a substantial portion of it to sub-purchasers and forwarded it to them. On March 23 the buyers, having examined samples of the wheat, rejected it on the ground, as the fact was, that it was not Rosario or Santa Fé wheat. The matter was referred to arbitration, and the arbitrators held that the notice of rejection was given with reasonable promptitude, and that the buyers were entitled to reject the wheat:—

Held, that the buyers, by reselling a part of the wheat without examination and sending it to their sub-purchasers, had done an act which was "inconsistent with the ownership of the sellers"; that they must therefore be deemed to have accepted it within the meaning of s. 35 of the Sale of Goods Act, 1893, and had lost their right of rejection.

AWARD stated in the form of a special case under s. 7 of the Arbitration Act, 1889.

By a contract dated March 1, 1922, made between

E. Hardy and Co. (London), Ld. (the sellers), and Messrs. Hillerns and Fowler (the buyers) the sellers agreed to sell to the buyers 2365 tons of Rosario and/or Santa Fé wheat shipped per ss. *Heathmore* from a port or ports in the Argentine Republic and/or Uruguay.

The buyers by their London bankers took up the bills of lading in respect of the wheat on March 20, 1922, and they were forwarded to the buyers in Hull and received by them on March 21, 1922.

The bills of lading described the goods as a "quantity of wheat . . . . shipped in good order and condition on board the steamship *Heathmore* now lying in the port of Concepcion del Uruguay."

The *Heathmore* arrived at Hull on March 18, 1922, and reported at the Customs on March 20.

On March 21, 1922, the buyers resold 200 quarters and 100 quarters of the wheat to purchasers at Barnsley and Nottingham respectively.

The wheat was discharged in bulk into and carried in lighters to the North Eastern Railway Company's wharf and there bagged and dispatched by rail. On the same day the buyers forwarded 500 quarters of the wheat to purchasers at Southwell by a vessel provided by the Trent Navigation Company.

On March 21 and 22 the buyers took samples of the wheat discharged ex the steamship, and on March 23 they rejected the wheat on the ground that it was not Rosario or Santa Fé wheat. It was in fact Entre Rios wheat. The sellers disputed the claim of the buyers to reject the wheat, and the dispute was referred to arbitration. By their award the arbitrators awarded that the sellers should take back the wheat and pay to the buyers the invoice amount which they had received plus freight and all charges incurred.

The sellers appealed to the Committee of Appeal.

The arbitrators found that the samples of the wheat taken by the buyers on March 21 were representative only of a small proportion of the contract quantity, and that the buyers acted reasonably in delaying a decision until further samples

Judgement accordingly

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were obtained on the following day. They further found that the buyers acted reasonably in not giving notice of rejection before March 23, and that such notice was given with reasonable promptitude.

By their award they awarded that the buyers were entitled to reject the wheat on March 23, 1922, and that they were entitled to recover from the sellers 30,479*l.* 19*s.* 5*d.* paid by them to the sellers in respect thereof with interest.

They further awarded that, if the Court should be of opinion that the buyers were not entitled to reject the wheat, the sellers should pay to the buyers the sum of 543*l.* 2*s.* 10*d.*, the difference between the market value of the wheat at the date of delivery and the market value of Rosario or Santa Fé wheat at the same date.

Jowitt K.C. and *Van Breda* for the sellers. Where goods are delivered at a place where there are proper facilities for sampling and examining them, and the buyer fails to examine them, however reasonable he may be, there is an acceptance of the goods. In the present case, the buyers having sent away a portion of the wheat to their sub-purchasers without having made a proper examination, it was too late for them to reject the goods: *Perkins* v. *Bell.* (1)

By s. 35 of the Sale of Goods Act, 1893, the buyer is deemed to have accepted the goods "when he does any act in relation to them which is inconsistent with the ownership of the seller." It is difficult to imagine anything more inconsistent with the ownership of the sellers than what was done by the buyers in the present case. In the circumstances there was a clear acceptance of the wheat: *Saunt* v. *Belcher & Gibbons.* (2)

Le Quesne for the buyers. The buyers have not lost their right to reject the wheat. It was impossible for them to get a really representative sample until March 23, and they could not therefore safely reject the goods till that date. They acted reasonably, and everything that they did was done in the ordinary course of business. The dispatching of some of the

(1) [1893] 1 Q. B. 193. (2) (1920) 26 Com. Cas. 115.

wheat to sub-purchasers was in the usual course of business. Damages can only be an adequate remedy where the goods in question are of the same description as the goods contracted for, not where, as in the present case, they are entirely different: *Van Den Hurk* v. *R. Martens & Co.* (1); *Parker* v. *Palmer* (2); *Saunt* v. *Belcher & Gibbons.* (3) Sect. 35 of the Sale of Goods Act must be read together with s. 34. The buyers had not had a "reasonable opportunity of examining" the wheat until March 23, when they rejected it.

GREER J. This is an application by the sellers of a quantity of what is described in the contract as Rosario and/or Santa Fé wheat to decide the question as to whether or not the buyers were justified in law in rejecting the wheat that was delivered to them under that contract. The facts are in a small compass. The goods were shipped on board the steamship *Heathmore* at a port called Concepcion del Uruguay, a port from which it is unusual to ship Rosario and/or Santa Fé wheat. In fact, what was shipped was not Rosario and/or Santa Fé wheat, but was Entre Rios wheat, and it did not comply with the contract. There was a condition in the contract that the wheat delivered should comply with the description, and it is said that the effect of that condition was that, if the buyers exercised their rights within the proper time and at a time when the law permitted them to exercise those rights, they could repudiate the contract; but a condition, even if it relates to the nature and character of the goods sold, is just like any other condition; where there is a condition that goods shall comply with the contract, if they are accepted either in fact or by reason of the operation of the provisions of the Sale of Goods Act, the condition becomes a warranty. The buyer is not deprived of all remedy, but his remedy is changed into a claim for damages for breach of contract in place of the right to reject the goods altogether. What happened in this case

(1) [1920] 1 K. B. 850. (2) (1821) 4 B. & Al. 387.
(3) (1920) 26 Com. Cas. 115.

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was that the vessel was discharged at Hull, and at Hull it was quite possible for the buyers to examine the goods in order to find out whether they were or were not in accordance with the contract. The arbitrators have found that, so far as time was concerned, the buyers examined the goods within a reasonable time, and were therefore not disentitled by reason of delay to take advantage of the condition in the contract and reject the goods, but they did not wait till the conclusion of the time necessary to complete their examination of the goods before dealing with a portion of them as their own property. Without waiting the necessary time to ascertain by examination whether the goods on arrival in Hull were or were not in accordance with the contract, they resold a portion of them and delivered them to the carrier, who under the circumstances, as the sale was ex ship, would be the carrier of the sub-purchaser, subject to the right of the sub-purchaser to reject if, when he had got the goods and had had a reasonable opportunity of examining them, he decided to reject them.

A substantial portion of the goods went a considerable distance by railway, and during that period they were under a contract which had arisen from the act of the buyers in dealing with them as if the property had passed to them, and they were their goods. The ship began to discharge, so far as this cargo was concerned, on March 21, 1922 ; samples were taken by the buyers, but though some suspicion attached to the samples, it could not be ascertained immediately, according to the finding of the arbitrators, by means of those samples that the goods were not in accordance with the contract. Further samples were taken on the 22nd, and later on that day the buyers discovered that the goods were not in accordance with the contract ; about noon on the 23rd they rejected the goods. On the 21st they had forwarded 200 quarters of the wheat to their sub-purchasers at Barnsley and 100 quarters to their sub-purchasers at Nottingham. This wheat was discharged in bulk into and carried in lighters to the North Eastern Railway Company's wharf, and there bagged and dispatched by rail. On the

same day the buyers forwarded 500 quarters of the wheat to their sub-purchasers at Southwell by a vessel provided by the Trent Navigation Company. On March 23, 1922, after giving the notice of rejection, the buyers stopped all the parcels which were still in transit to the purchasers, and the same were returned to and stored in Hull. The balance of the 958 tons discharged was delivered direct into store at Hull.

The buyers having rejected the whole parcel, arbitration took place on the question as to whether they were entitled to reject the goods. No claim was made before the arbitrators that the buyers were entitled to reject that portion of the goods which went direct into store; the only point made was that they were entitled to reject the whole, and the question I am asked to decide is whether they were entitled to reject the whole parcel. That depends upon the true construction of ss. 34, 35 and 36 of the Sale of Goods Act. [The learned judge read s. 34 and continued :] That seems to me to mean this: the mere fact that the buyer has taken delivery of the goods does not amount to an acceptance until he has had a sufficient period for examining them to see whether they are or are not in accordance with the contract. Sect. 34 does not, in my judgment, limit in any way s. 35, which is in these terms, "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them," notwithstanding that he may not have had a reasonable opportunity of examining them as provided for by s. 34. It seems to me to have that effect. The section goes on: "Or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." The only part of that section I have to consider is whether the buyers have done any act in relation to the goods which is inconsistent with the ownership of the sellers, because the arbitrators have found that the buyers did not retain the goods for more than a reasonable time before intimating that they rejected them. Sect. 36 has, I think,

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some bearing upon it. [The learned judge read the section and continued :] That seems to me to mean this : if the buyer is entitled to reject at the time when he exercises his right of rejection, it does not matter where the goods are, he is not bound to send them back to the seller ; it is the seller's business to go and get possession of his own goods. If the buyer was entitled to reject them when they had been sent 100 miles, or it may be 500 miles, away from the place where they were delivered, it would, in my judgment, be for the seller to take the goods back to the place of delivery. I think that that supports the view that if the buyer for his own purposes sends the goods away from the place of delivery, it is not likely that the statute would put upon the seller the obligation of paying the cost of bringing them back to the place to which he had sent them. Looking at s. 35, it seems to me that if the buyer has taken the risk of dealing with the goods before he has exercised a reasonable opportunity that he has of examining them, he cannot reject them if the act which he has done is one which is inconsistent with the ownership of the seller, and to send them away from the place where the seller has delivered them, and subject them to the risks of the railway transit and the risks of deterioration, if they are goods that would deteriorate, is in my judgment inconsistent with the ownership of the seller. I am supported in that view by the judgment in *Perkins* v. *Bell* (1) which has been referred to. All I need do is to call attention to the words of A. L. Smith L.J. who, in giving judgment, said : "To hold otherwise"—that is to say, to hold that the goods could be rejected after having been sent away to sub-purchasers—"would be to expose the vendor to unknown risks, impossible of calculation, when the contract was entered into. The vendee might consign the barley not only to one, but to different sub-vendees, living in different places and at different distances from Theddingworth Station"—which was the place of delivery—"and until arrival at these places the barley would be at the risk of the vendor." What the Lord

(1) [1893] 1 Q. B. 193, 197.

Justice was describing there is what has happened in this case—that is to say, the vendee has consigned portions of the wheat to different sub-vendees living in different places and at different distances from Hull. Applying those words, it seems to me quite clear that they are an authority for the proposition that, if that is done, it is an act which prevents the rejection. It is an act which is inconsistent with the ownership of the seller.

Other cases were cited, and I wish to say a few words about them, as they were relied upon in the very able argument of the buyer's counsel. The case of *Van Den Hurk* v. *R. Martens & Co.* (1) was cited in support of the view that goods might be rejected after they had been sent on to sub-purchasers. On looking at that case it seems to me that the question did not arise; the question of the right of rejection was not in dispute in the arbitration. The question was as to the measure of damages, and the case seems to me to be only an authority for the proposition that when it is reasonable and in the ordinary course of business for goods to be sent on to sub-purchasers without examination, either because of good reasons connected with business, or because the nature of the goods is such that they ought not to be opened till they have reached the consumer, in that case the damages arising at the later date, when they have got to the consumer, are damages which naturally arise from the breach, and are therefore within the legal measure of damages and recoverable. The case of *Saunt* v. *Belcher & Gibbons* (2) was also cited for the sellers and to some extent relied upon by the buyers. It seems to me that that case supports the view that I have taken, and does not support the argument of the buyers' counsel, and the same observation applies to the case of *Parker* v. *Palmer*. (3)

It is true that there may be cases in which rejection is justified after the goods have been sent on from the place of delivery to a sub-purchaser, and it is quite possible that some of the cases which were referred to by counsel for the buyers were cases of that sort. It may be that the goods

(1) [1920] 1 K. B. 850. (2) 26 Com. Cas. 115. (3) 4 B. & Al. 387.

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were in such a condition that they could not, without destroying their utility for the consumer, be examined before they got to the consumer, and that under those circumstances there might be a right of rejection, notwithstanding the fact that they had been sent on to the consumer; but I have not to deal with a case of that sort, and I do not decide anything with regard to it, nor do I find that the point was really decided in any of the cases which have been cited.

Mr. Le Quesne raised another point. He said that the buyers were entitled to reject that part of the goods which had not been sent on to the sub-purchasers but had been warehoused in Hull, and therefore that they were entitled to damages in respect of the failure of the goods sent on to comply with the contract, and to reject the balance of the goods altogether. With regard to that point it seems to me that it is not open to me to consider it, because I have not been asked by the arbitrators to do so. I shall only answer the question which is raised, not expressly but inferentially, by the case—namely, whether the rejection of the whole quantity was or was not a valid rejection. If my view is desired on the other point, I may say that, in my judgment, there could not be an acceptance of part and a rejection of the balance; that can be done when a portion of the goods is obviously in accordance with the contract and another part is not, but where the same objection applies to the whole quantity, and a portion has been accepted notwithstanding the objection, there cannot be a rejection of a part. That point, however, is not raised by the case, and my views upon it are obiter and need not be regarded as any authority for the proposition.

The result is that the question raised is answered in favour of the sellers. In my opinion the buyers were not entitled to reject, and the award in the last paragraph of the case stands.

Judgment accordingly.

Solicitors for sellers: *Richards & Butler.*

Solicitors for buyers: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

F. C.

WESTEN *v.* FAIRBRIDGE (EXECUTORS) AND OTHERS.

1923
Feb. 1, 5, 8.

[1922. W. 4359.]

Bill of Sale—Grantor not true Owner—True Owner Wife of Grantor—Statutory Declaration by true Owner that Goods belonged to Grantor—Goods described in Schedule as those of Grantor—Claim by true Owner—Estoppel—Bills of Sale Act (1878) *Amendment Act,* 1882 (45 *&* 46 *Vict. c.* 43), *s.* 5—*Right of Wife to independent legal Advice.*

The grantor of a bill of sale described the goods in the schedule thereto as his own, though in fact the true owner was the plaintiff, his wife. The bill of sale was given as security for a loan to the grantor from the defendant, and at the time of its execution the wife made a statutory declaration that the goods were those of her husband. One firm of solicitors acted for all the parties in this transaction:—

Held, on a claim by the wife to the goods, that she was estopped from denying that the goods were those of her husband, and of thus showing that the bill of sale was void as against the defendant under s. 5 of the Bills of Sale Act, 1882.

Held, also, that the wife was not entitled to say that she should have had independent legal advice, and that having acted without it she was not estopped from claiming the goods.

ACTION tried by Bray J.

The plaintiff, Alice Esther Maria Westen, a married woman, claimed an injunction and declaration against the defendants A. N. Romain and Patrick Fitzgibbon, executors of the late Walter Cornelius Fairbridge, and Messrs. Dutch and Dutch.

The plaintiff was the wife of Albert Charles Westen, a dentist. In June, 1920, the plaintiff's husband applied to the deceased, W. C. Fairbridge, a registered money-lender, for a loan of 250*l.*, offering as security certain furniture and dentist's fittings, then on premises at 20 Kennington Park Road and 150 Strand, which were included in a bill of sale of which the husband was the grantor. Bray J. found that in fact these goods then belonged to the plaintiff, and not to her husband. Notwithstanding this the plaintiff, at the time of the execution of the bill of sale, made the usual statutory declaration that her husband was the owner of the goods, in the belief, as she alleged, that she was only giving a consent as a matter of form. She also alleged that she informed Fairbridge of the facts, but Bray J. did not accept her evidence

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on this point. The bill of sale, dated June 30, 1920, was duly executed, and the 250*l.* advanced to the plaintiff's husband. The same firm of solicitors acted for the husband, the wife, and Fairbridge. On the petition of another creditor a receiving order in bankruptcy was made against the husband on November 8, 1920. The Official Receiver treating such of the goods comprised in the bill of sale as belonged to the business, such as dental instruments, etc., as being in the possession, order or disposition of the husband, took possession of them, and Fairbridge eventually purchased them from the Official Receiver. Fairbridge died on January 26, 1922, and his executors, the defendants, finding that the plaintiff's husband was not keeping up his payments under the bill of sale, handed a warrant dated November 17, 1922, to the defendants, Messrs. Dutch and Dutch, certified bailiffs, who duly took possession of the remaining goods scheduled to the bill of sale on November 20, 1922. Removal of the goods was deferred at the request of the plaintiff's husband, and on December 1, 1922, the plaintiff issued the writ in the action, and on December 2 was granted ex parte an interim injunction by Bailhache J. which was at various times continued until the trial of the action. The plaintiff now claimed an injunction restraining the defendants from trespassing on the premises and removing the goods comprised in the bill of sale, and for a declaration setting it aside.

Wickham for the plaintiff. The solicitors who acted in the matter of the bill of sale ought to have seen that the plaintiff had separate legal advice: *Bank of Montreal* v. *Stuart.* (1)

The bill of sale is void by reason of s. 5 of the Bills of Sale Act, 1882, inasmuch as the grantor was not the true owner of the goods described in the schedule. If it is contended that the plaintiff is estopped by her conduct from denying that the goods were the property of the grantor, the doctrine does not apply so as to defeat the statute: *In re Stapleford Colliery Co.* per Bacon V.-C. (2)

(1) [1911] A. C. 120, 138. (2) (1880) 14 Ch. D. 432, 441.

[*Brandon Hill, Ld.* v. *Lane* (1) was also referred to.]

Matthews K.C. and *F. Hinde* for the defendants. The plaintiff by her conduct is estopped from denying that the goods are those of the grantor. *Brandon Hill, Ld.* v. *Lane* (1) was not a decision on this point, and indeed Horridge J. uses words in his judgment (2) suggesting that the statute might be defeated by estoppel, though it was only obiter dictum. It is incredible that the Legislature should have intended to work such an injustice as to prevent this estoppel from applying. In Reed on Bills of Sale, 13th ed., it is said, at p. 36: "If the true owner stands by and allows another to deal with goods as if he were the owner, and thereby induces a third party to purchase or make advances upon them, he cannot afterwards, though he acted under a mistake, claim them from such third party." The point now contended for never occurred to the learned author, who was a great authority on the Bills of Sale Acts.

With regard to the contention that the wife ought to have had independent advice, the relation of husband and wife is not one to which the doctrine in *Huguenin* v. *Baseley* (3) applies: *Barron* v. *Willis* (4), approved by the Court of Appeal in *Howes* v. *Bishop* (5), though reversed in the Court of Appeal (6) and House of Lords (7) on the question of fact. That doctrine is that persons in certain relations are entitled to special care and providence.

[*Bank of Montreal* v. *Stuart* (8) was also referred to.]

There was no evidence of undue pressure on the wife, but even if there were, knowledge of it by Fairbridge must be shown (*Bainbrigge* v. *Browne* (9)), and this was not done.

Wickham in reply. The solicitors were acting for all the parties in the bill of sale transaction, and were therefore in a position in which it was almost impossible for them to act fairly: per Lord Macnaghten in *Bank of Montreal* v. *Stuart*. (8) The wife was entitled to look for advice to her

(1) [1915] 1 K. B. 250.
(2) Ibid. 255.
(3) (1807) 14 Ves. 273.
(4) [1899] 2 Ch. 578.
(5) [1909] 2 K. B. 390.
(6) [1900] 2 Ch. 121.
(7) [1902] A. C. 271.
(8) [1911] A. C. 120, 137.
(9) (1881) 18 Ch. D. 188, 196-7.

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husband's solicitors: per Lord Davey in *Willis* v. *Barron* (1), and they should have advised her to get the advice of another solicitor.

Cur. adv. vult.

1923. Feb. 8. BRAY J. The plaintiff is claiming an injunction against the defendants on the ground that the goods seized by them under a bill of sale belonged to her, and not to the grantor, and that, consequently, the bill of sale is void under the provisions of s. 5 of the Bills of Sale Act, 1882. [His Lordship read the section.] The first matter I have to consider is whether the plaintiff was in fact the owner of these goods at the time of the execution of the bill of sale. [His Lordship discussed the evidence.] I am satisfied that she was. Nevertheless, she made a statutory declaration that the goods were her husband's and not hers. The defendant contends, therefore, that she is estopped from saying now that the goods were hers, and cannot be heard to say that they were not the goods of the grantor. To that it is replied that there can be no estoppel against a statute, and that is the real point in the case. In support of the latter proposition the judgment of Bacon V.-C. in *In re Stapleford Colliery Co.* was cited. He says (2): "An argument was addressed to me to show that there has been an estoppel. But the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract inter partes, and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament. It cannot be doubted that the statute covers this contract; nor can it be argued that it is possible for directors, by issuing fully paid-up shares which get into the hands of holders for value without notice, to avoid the requirements of the statute. The Act of Parliament was designed for the protection of creditors; it was consideration for the rights of creditors which caused the enactment to be made; it is the creditors whose rights will be sacrificed if the Act can be violated with impunity. I am of opinion

(1) [1902] A. C. 271, 283. (2) 14 Ch. D. 441.

that, as between the parties to this contract, there was no estoppel." That referred to s. 25 of the Companies Act, 1867 (now repealed), which provided that if a contract was made for the allotment of shares for a consideration other than money, the contract must be filed with the Registrar. It was consideration for the rights of creditors that caused that enactment to be passed. That case is a different one from the present case. The shares in that case were in fact issued for a consideration other than money, but it was contended that the company by issuing them as fully paid was estopped from saying that they were issued for other than a money consideration. Sect. 5 of the Bills of Sale Act, 1882, has nothing to do with creditors; its first and main object is to provide against the assignment of after-acquired property, and it was rather for the protection of the true owner of the goods than for that of creditors. The case of *Brandon Hill, Ld.* v. *Lane* (1) was cited in support of the plaintiff's proposition. Now it is to be observed that in the headnote to the report nothing is said about estoppel, nor was *In re Stapleford Colliery Co.* (2) cited. The contention in the former case was that as the wife, who was not the owner of the goods, the subject matter of the bill of sale, had been made a party thereto, although she did not join in the assignment of the goods nor the covenant for payment of principal and interest, the bill of sale was not in the statutory form inasmuch as the joinder of the wife gave it a legal effect different from what it would have in its statutory form. The Court decided that the joinder of the wife had no legal effect at all. Horridge J. said (3): "It may be truly said that the recitals and the fact of the wife joining might be used as evidence of acquiescence so as to prevent her at any future time disputing the validity of the document, but I do not think that this affects the operation of the document in any way as a bill of sale so as to render it different from what it would be if it was in the exact form required by the statute."

The point raised before me was not raised in argument

(1) [1915] 1 K. B. 250. (2) 14 Ch. D. 432.
(3) [1915] 1 K. B. 255.

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in that case, and I am not bound by it; therefore I have to consider the matter as governed by a section which was enacted mainly for the protection of the true owner of the goods. It is a privilege given to the wife, the true owner in this case, which she might by contract estop herself from enjoying. I have come to the conclusion that her conduct in fact created an estoppel binding upon her, and that her husband is to be taken to be the true owner of the goods. If she informed Fairbridge that she was the owner there is no estoppel; and she swore that she did so on at least two occasions, and that he told her that the statement in the bill of sale was only a matter of form. I have heard the evidence on the other side and I cannot accept her testimony on this point. The result is that she is estopped from saying that she was the true owner of these chattels at the time of the execution of the bill of sale. I am sorry to have to come to that conclusion, because I have no doubt she was strongly pressed by her husband to sign.

I think it is impossible to lay down a rule that a wife who joins her husband in executing a document drawn up to enable him to borrow money must have independent advice, or to suggest in this case that she was under the influence of her husband, a fact in any case unknown to Fairbridge, and to say that as she did not have independent advice and was under that influence that she is not bound. The cases of *Barron* v. *Willis* (1) and *Bank of Montreal* v. *Stuart* (2) were cited for the plaintiff. The former does not support the proposition contended for, and the latter was quite a different case.

I therefore hold that the plaintiff is not entitled to the injunction she asks for, and there must be judgment for the defendants.

Judgment for defendants.

Solicitor for plaintiff: *John K. Torkington.*

Solicitors for defendants: *Romain & Romain.*

(1) [1899] 2 Ch. 578. (2) [1911] A. C. 120.

W. L. L. B.

[IN THE COURT OF APPEAL.]

C. A.
1923
Jan. 11.

SWISS BANK CORPORATION *v.* BOEHMISCHE INDUSTRIAL BANK.

[1922 S. 2858.]

Practice—Garnishee Order—Discretion of Court—Discharge of Garnishee—Liability to pay a Second Time—Debt due to Foreign Corporation—Rules of Supreme Court, Order XLV., *r.* 7.

Judgment having been recovered against a foreign corporation, who submitted to the jurisdiction, a garnishee summons was issued to attach a debt due from a London bank to the foreign corporation :—

Held, that the judgment creditors were entitled to have an order nisi made absolute, inasmuch as payment under a garnishee order operates as a discharge of the amount paid and is recognized by international law as having that effect, and consequently there was no real risk of the garnishees being obliged to pay the debt over again to the foreign corporation, and there was therefore nothing inequitable in making the order absolute.

Martin v. *Nadel* [1906] 2 K. B. 26 commented on and distinguished.

On June 9, 1922, the Swiss Bank Corporation issued a writ against the Böhmische Industrial Bank claiming 54,884*l.* 16*s.* 6*d.*, the balance of an account appearing on April 30, 1922, in respect of money lent to the defendants and money paid by the plaintiffs for and at the request of the defendants and for interest and commission thereon. The defendants were a foreign corporation carrying on business in Prague in the Republic of Czecho-Slovakia. Notice of the writ was served upon them there. The defendants entered an appearance conditionally at first, but afterwards, when the plaintiffs had taken out a summons under Order XIV., the defendants filed an affidavit in answer objecting to pay so much of the claim as represented interest on the amounts advanced.

On August 25 an order was made in chambers that the plaintiffs should be at liberty to sign final judgment for 29,422*l.* 16*s.* 10*d.*, the amount of the principal money advanced, and that the defendants should be at liberty to defend the action as to the residue of the plaintiffs' claim. On August 28 the plaintiffs signed final judgment for 29,422*l.* 16*s.* 10*d.* On November 13 the defendants delivered their defence denying

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that any sums other than principal money were ever due and owing from them and insisting that the plaintiffs' claim was a matter of international treaty and that the Court had no jurisdiction to entertain the action.

A garnishee summons was then issued against the National Provincial and Union Bank of England supported by an affidavit of Henri Jenne, sub-manager to the judgment creditors, stating that the judgment debt of 29,422*l.* 16*s.* 10*d.* remained wholly unsatisfied, that the London agents of the judgment debtors were Barclays Bank, Ld., and the National Provincial and Union Bank of England, and that from information acquired by him in the course of his duties as sub-manager of the judgment creditors he verily believed: (*a*) that in addition to Barclays Bank and the National Provincial and Union Bank of England the judgment debtors transacted banking business with, among others, the London Merchant Bank, and (*b*) that the National Provincial and Union Bank of England, the London Merchant Bank and others in the ordinary course of business would be and were then indebted to the judgment debtors in respect of moneys the property of the judgment debtors in their hands respectively as agents.

A similar summons was issued against the London Merchant Bank supported by an affidavit of the said H. Jenne in similar terms.

On August 28 a garnishee order nisi was made against the National Provincial and Union Bank of England attaching all debts owing or accruing due from the garnishees to the judgment debtors. On September 5 an order in similar terms was made against the London Merchant Bank. The last-named garnishees opposed the order upon the grounds stated in an affidavit of Arthur George Haswell, their sub-manager, which contained the following paragraphs:—

"1. The above named Böhmische Industrial Bank, the judgment debtors herein, have an account with the garnishees and the garnishees have an account with the judgment debtors, and on taking the balances of the accounts there was due and owing by the above named garnishees to the judgment debtors

on September 5, 1922, the date of the making and service of the garnishee order nisi herein, the sum of 9,303*l.* 11*s.* 4*d.*

"2. The Böhmische Industrial Bank, the above named judgment debtors, carry on business at Prague in the Republic of Czecho-Slovakia. They do not carry on business in this country and have no place of business within the jurisdiction of this Honourable Court and are not subject to its jurisdiction.

"3. The above named garnishees are advised, and I verily believe, that should they be ordered by this Honourable Court to pay the amount due from them to the judgment debtors to the above named creditors, it would still leave them liable to an action to recover the same debt brought in a competent Court in a foreign place, and that in such an action they would probably be ordered to pay the amount now sought to be recovered from them by the above named judgment creditors over again to the Böhmische Industrial Bank, the above named judgment debtors."

On September 9 orders were made in chambers discharging the garnishee orders nisi of August 28 and September 5.

On December 8 two motions were made to the Divisional Court to discharge the orders of September 9. The Divisional Court (Darling and Salter JJ.) dismissed these motions, but ordered that the garnishee orders nisi should stand until the hearing of an appeal to the Court of Appeal.

The plaintiffs appealed and prayed for an order that the garnishee orders nisi might be made absolute.

Sir John Simon K.C. and *Rayner Goddard* for the appellants. The judges in the Divisional Court refused to make the orders absolute on the ground that it might be inequitable to do so. They considered themselves bound by *Martin* v. *Nadel* (1) to hold that if the garnishees should pay to the Swiss Bank Corporation the debt they owe to the Böhmische Industrial Bank they might be compelled by proceedings in Prague to pay it over again to the Böhmische Industrial Bank. *Martin* v. *Nadel* (1) is no authority for that proposition. In that case the foreign Court was the proper Court to exercise

(1) [1906] 2 K. B. 26.

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jurisdiction over the debt sought to be garnished. It was a debt contracted in Berlin and payable in Berlin. In the present case the debt sought to be garnished was contracted in London and payable here, and the Courts of this country are the proper ones to exercise jurisdiction over it. By Order XLV., r. 7, of the Rules of the Supreme Court payment under a garnishee order is a valid discharge of the amount paid. Consequently it will be recognized by international law as a good discharge: Dicey, Conflict of Laws (1); *Le Chevalier* v. *Lynch.* (2) Nothing is more clear than that a person who has been compelled by a competent jurisdiction to pay a debt once shall not be compelled to pay it over again: *Hunter* v. *Potts* (3); Foote's International Jurisprudence. (4) The London Merchant Bank if sued in Czecho-Slovakia in respect of this debt need only prove payment under this garnishee order and the action against them must fail.

[SCRUTTON L.J. referred to *Ellis* v. *M'Henry.* (5)]

[*Cammell* v. *Sewell* (6) and *Joachimson* v. *Swiss Bank Corporation* (7) were also cited.]

Blanco White for the respondents, the London Merchant Bank. This case is covered by *Martin* v. *Nadel.* (8) The judgment of Vaughan Williams L.J. in that case is directly in point. "It appears to me to be clear," said the Lord Justice, "that a garnishee order is of the nature of an execution, and is governed by the lex fori; and by international law an execution which has been carried into effect in a foreign country under foreign law, and has taken away part of a man's property, is not recognized as binding. . . . . I am not going to decide on the ground that the debt was really contracted in Germany, and that prima facie German law would govern the contract. To my mind that makes no difference, and for this reason": viz., that the Court ought not to make an order for payment upon a garnishee application in a case where it would be inequitable to do so. The judgment of Stirling L.J. proceeds on the same principle—namely, that

(1) 3rd ed. (1922), pp. 342, 565.
(2) (1779) 1 Doug. 170, note *f.*
(3) (1791) 4 T. R. 182, 187.
(4) 4th ed. (1914), p. 304.
(5) (1871) L. R. 6 C. P. 228.
(6) (1860) 5 H. & N. 728.
(7) [1921] 3 K. B. 110.
(8) [1906] 2 K. B. 26, 29, 31.

Order XLV., r. 7, of the Rules of the Supreme Court, although it provides that payment by a garnishee is a valid discharge as against the debtor, "cannot affect the rights of a person"—in this case the Böhmische Industrial Bank—"who is not within the jurisdiction of the Court and is not subject to its jurisdiction."

[He cited Story, Conflict of Laws, §§ 331, 332, 335, 575.]

Morle for the National Provincial and Union Bank of England.

Counsel for the appellants were not called on in reply.

BANKES L.J. This is an appeal from the Divisional Court, who in the exercise of their discretion refused to make absolute a garnishee order because they considered that the decision of the Court of Appeal in *Martin* v. *Nadel* (1) covered the facts of this case.

The judgment creditors, the Swiss Bank Corporation, recovered judgment for some 29,400*l.* against the Böhmische Industrial Bank, a bank carrying on business at Prague. It is important to notice that the judgment debtors appeared to that action and thereby submitted themselves to the jurisdiction of the Court. Garnishee proceedings were then commenced upon statements made in an affidavit of M. Henri Jenne that he had reason to believe that the garnishees, the London Merchant Bank, were indebted to the judgment debtors as the result of banking business carried on with or for them. A garnishee order nisi was obtained. Thereupon the garnishees produced an affidavit sworn by Mr. Arthur George Haswell, in which he admitted that the garnishees, a bank carrying on business in London, owed the judgment debtors a sum of 9303*l.* 11*s.* 4*d.* He went on to state that a payment under an order of this Court would still leave the garnishees "liable to an action to recover the same debt brought in a competent Court in a foreign place, and that in such an action they would probably be ordered to pay the amount now sought to be recovered from them by the above named judgment creditors over again to the Böhmische

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Industrial Bank." This very vague general statement of the alleged risk has been treated as sufficient to raise the question whether there is any real risk that the garnishees, if they pay the judgment creditors under a garnishee order the amount they admit they owe to the judgment debtors, will be called upon to pay that amount over again in any proceedings which may be taken against them in Prague or elsewhere in any foreign country.

The decision of that question depends upon where the debt sought to be attached is situate. If the debt is situate, or in other words if it is properly recoverable, in this country, then it would be discharged by payment under an order of our Courts and the garnishee need have no fear of being required to pay it a second time; but if the debt is situate, that is properly recoverable, in a foreign country, then it is not discharged by payment in this country under an order of the Courts of this country, and the debtor may be called upon to pay it over again in the foreign country. There is no doubt as to the effect of payment made under a garnishee order here. It is clearly a discharge pro tanto of the debt. That was declared by s. 65 of the Common Law Procedure Act, 1854, which has been reproduced in Order XLV., r. 7, of the Rules of the Supreme Court. That rule provides that "Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the debtor, liable under a judgment or order, to the amount paid or levied, although such proceeding may be set aside, or the judgment or order reversed."

Now when a debt payable in this country is discharged by a Court of competent jurisdiction in this country what is the result? It is clearly expressed by Bovill C.J. in *Ellis* v. *M'Henry* (1): "There is no doubt," said the Chief Justice, "that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the

(1) L. R. 6 C. P. 228, 234.

Courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries." In my opinion the debt due from the garnishee to the judgment debtor was a liability arising in this country, which therefore according to the law as stated by Bovill C.J. may be discharged by the laws of this country. I need say no more on the matter, but for *Martin* v. *Nadel* (1), which was relied on by the Divisional Court and strongly relied on by counsel for the respondents. There is a vital distinction between the facts of that case and the facts of the present case. In that case a judgment debtor had paid into his bank in Berlin a certain sum of money. The garnishees in that case were the London branch of that bank. They had entered into a recognizance for the same amount. The amount found due on the recognizance was less than the amount paid into the Berlin office by the judgment debtor, so that when the London branch paid this lesser sum there remained the balance due in Berlin from the Berlin office to the judgment debtor. That was a debt situate in Berlin, being properly recoverable in Berlin. That was the debt sought to be garnished. Here the debt sought to be garnished was a debt situate in England being properly recoverable in England. In this case the debt can be properly discharged in England. In *Martin* v. *Nadel* (1) the debt could be properly discharged only in Berlin. The ground of that decision is best expressed in a few lines from the judgment of Stirling L.J. After referring to the rule of law stated in Dicey's Conflict of Laws (2) that debts or choses in action are generally to be regarded as situate in the country where they are properly recoverable or can be enforced, the Lord Justice says (3): "On the facts of this case the debt of the bank to Nadel would be properly recoverable in Germany. That being so, it must be taken that the order of this Court would not protect the bank from being called on to pay the debt a second time." It may be that as reported some of the language of Vaughan Williams L.J. seems to go further than

(1) [1906] 2 K. B. 26.
(2) First ed. (1896), p. 318; 3rd ed. (1922), p. 342.
(3) [1906] 2 K. B. 31.

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that, but I am satisfied that the decision of the Court proceeded on the basis that the debt in that case was situate in Germany and that garnishee proceedings in England were mere procedure which would not be recognized in international law. That is not so in the present case. The debt in this case is situate in England and is discharged in whole or in part by payment under a garnishee order in England, which is not mere procedure and is recognized in international law. In my opinion *Martin* v. *Nadel* (1) does not support the decision of the Divisional Court or the argument for the respondents. The appeal must be allowed and the garnishee order must be made absolute.

SCRUTTON L.J. I am of the same opinion. The Swiss Bank Corporation brought an action against the Böhmische Industrial Bank carrying on business in Prague in Czecho-Slovakia for 54,000*l.* It is an important fact that the Böhmische Industrial Bank entered an appearance to the writ. Apparently leave was obtained to serve them out of the jurisdiction. We are told that they entered a conditional appearance. They failed to set aside service of the writ, but then, instead of leaving the Swiss Bank Corporation to make what they could out of any judgment they might get by default, they appeared by their solicitor in the proceedings under Order XIV. and got leave to defend as to the greater part of the claim. Judgment however was recovered against them for some 29,000*l.*, the amount of the principal money advanced to them or at their request. It was then discovered, and it has been admitted, that the London Merchant Bank owed about 9000*l.* to the Böhmische Industrial Bank. The Swiss Bank Corporation obtained a garnishee order nisi against the London Merchant Bank, and the question is whether that order should be made absolute.

The Divisional Court have refused to make the order absolute, holding that the facts of this case bring it within the decision in *Martin* v. *Nadel* (1), that the Court will not make absolute a garnishee order where it will not operate to discharge the

(1) [1906] 2 K. B. 26.

garnishee in whole or pro tanto from the debt; it will not expose him to the risk of having to pay the debt or part of it twice over. That is well established as a principle of discretion on which the Court acts. The question therefore may be stated thus: Is there here any evidence that the London Merchant Bank, if they pay this 9000*l.* to the Swiss Bank Corporation, will run any substantial risk of being compelled to pay it over again to the Böhmische Industrial Bank by action in Czecho-Slovakia? I am disposed to agree with the comment made by Bankes L.J. on para. 3 of Mr. Haswell's affidavit. It is certainly not sufficient to establish any risk of a double payment by the London Merchant Bank. Neither the "competent Court" nor the "foreign place" is specified, and the evidence of the alleged risk is very vague and unsatisfactory. I also agree with Bankes L.J. that the principle we have to apply is that which was stated by Bovill C.J. in *Ellis* v. *M'Henry* (1): "In the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the Courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries." Does this debt of 9000*l.* arise in this country? It is a sum held by a banker, who is resident in this country, for his customer and not payable until it is demanded in this country. In my view that is a debt arising in this country and situate in this country. I can understand the reluctance of a foreign Court to acknowledge the validity of a judgment recovered in this country where the debtor is not subject, or where by the foreign law he is not subject, to the laws of this country. For instance, many foreign countries do not recognize the English method of service out of the jurisdiction. If a writ, or notice of the issue of a writ, is served upon one of their subjects they decline to recognize the writ or any proceeding based upon it; but if a foreigner

(1) L. R. 6 C. P. 234.

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appears to a writ, and takes part in an action and so submits himself to the jurisdiction of our Courts and obtains a benefit by so doing, I am not aware that any foreign country declines to recognize the validity of a judgment recovered against him. That is what happened in this case. The Böhmische Industrial Bank, a Czecho-Slovakian subject, appeared to a writ issued in this country to recover a debt arising in this country, and obtained certain benefits by so appearing, the judgment ultimately recovered being for part only of the sum claimed. These facts bring this case within the principle laid down by Bovill C.J. in *Ellis* v. *M'Henry*. (1) The debt arose in this country, the debtor appeared to process in this country, and the legislation of this country, first s. 65 of the Common Law Procedure Act, 1854, and then Order XLV., r. 7, discharges a debt paid under a garnishee order absolute. In *Martin* v. *Nadel* (2), which the Divisional Court has followed, the facts were quite different. Judgment had been recovered against Nadel in this country. To enable him to appeal to the House of Lords he had to deposit in Court a certain sum and give a recognizance for a further sum of 500*l.* By arrangement with a branch of the Dresdner Bank in Berlin, where he resided, he paid into that branch the equivalent of 500*l.* and thereupon the London Branch of the Dresdner Bank entered into the required recognizance for 500*l.* The appeal to the House of Lords was dismissed with costs, which were paid partly by applying the sum deposited in Court and as to the balance of something over 300*l.* by the London branch of the Dresdner Bank under their recognizance. The result was that there remained in the hands of the Berlin branch a sum of 198*l.* 9*s.* 8*d.* due to Nadel. But that debt was not in London; it was in Berlin. Nadel having deposited the 500*l.* with the branch in Berlin could not without more have made good a claim to be paid the 198*l.* 9*s.* 8*d.* by the London branch. Before he could do anything he must make his claim on the Berlin branch who had the money, not on the London branch who had not. Clearly that debt did not arise in this country; equally clearly the debt in the present case did arise in this

(1) L. R. 6 C. P. 228, 234. (2) [1906] 2 K. B. 26.

country. Moreover, in *Martin* v. *Nadel* (1) it was admitted that a garnishee order absolute in this country would have been no answer to a claim on the branch in Berlin. Vaughan Williams L.J. said (2): "I do not think that ultimately it was disputed that such a payment would be no answer to the action." Stirling L.J. said (3): "It is objected, and is to be taken as a fact, that the German law would not recognize a payment made under a garnishee order in this country." Very likely that admission was properly made in that case, because the debt was not an English debt and was not one on which the English Courts could exercise jurisdiction; but in this case there is an English debt payable to foreigners who have appeared to an action in this country. In *Martin* v. *Nadel* (1) it was taken as admitted that an action in Germany against the Berlin branch of the Bank must succeed, although the London branch had paid the debt under a garnishee order absolute. In this case it is not admitted and the evidence is quite insufficient to show that the garnishees run any serious risk of being obliged to pay over again in Prague or elsewhere the debt which they pay under this garnishee order. In short the facts in this case are quite different from those in *Martin* v. *Nadel* (1), which the Divisional Court felt to be binding upon them. For these reasons I think the decision of that Court must be reversed and the garnishee order must be made absolute.

I should like to add that since the argument I have been referred to *Gould* v. *Webb* (4), where to counts in indebitatus assumpsit it was pleaded that as to 50*l.* an action had been brought and judgment recovered in the Supreme Court of the United States against the plaintiff and that the 50*l.* due from the defendant to the plaintiff had been attached and paid over to the Sheriff of New York under an execution; and this was held a good plea by the Court of Queen's Bench.

ATKIN L.J. I agree. The plaintiffs sued a foreigner who though resident out of the jurisdiction appeared in the

(1) [1906] 2 K. B. 26.
(2) [1906] 2 K. B. 29.
(3) [1906] 2 K. B. 31.
(4) (1855) 4 E. & B. 933.

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proceedings. The plaintiffs having got judgment by an order of the Court now seek to get execution by attaching a debt which to my mind clearly "arises" and "is situate" within the territorial limits of the jurisdiction of the English Courts, if there is any difference between the two expressions. Those Courts have statutory power to order execution to issue against such property, and by our law, and by the principles of private international law, such process when executed has the effect of discharging the person who owes the debt thus attached from further liability to pay it. It follows that the Court would rightly exercise its statutory jurisdiction and discretion by allowing this execution to issue, inasmuch as the effect of the execution will be to discharge the London Merchant Bank, the garnishees, of their debt to the Böhmische Industrial Bank, the judgment debtors. *Martin* v. *Nadel* (1) is plainly distinguishable, and its only claim to be considered in this case is by reason of a sentence in the judgment of Vaughan Williams L.J. as reported in the Law Reports (2), which appears in much the same terms in the three other reports of the case. (3) The sentence in the Law Reports runs thus: "By international law an execution which has been carried into effect in a foreign country under foreign law, and has taken away part of a man's property, is not recognized as binding." That sentence taken by itself appears to me so plainly too wide that I feel satisfied that the very learned judge to whom it was ascribed cannot have intended the wide meaning now attributed to the words used. In their widest meaning they would indicate that if a judgment were recovered in a Court of competent jurisdiction in this country against a foreigner, the owner of a foreign ship, and the ship having arrived in this country were taken in execution and sold under the judgment, the former owner of that ship could, when she returned to a foreign jurisdiction, claim that he had never been divested of his property in her. That seems to me to be wrong. I think, when he used the words "execution which has been carried into effect in a foreign

(1) [1906] 2 K. B. 26.
(2) [1906] 2 K. B. 29.
(3) 75 L. J. (K. B.) 620; 95 L. T. 16; 54 W. R. 525.

country under foreign law," the learned Lord Justice intended to exclude that foreign country in which the property happened to be situate. So read, it may be that the sentence is not open to criticism. But where a competent Court issues execution upon property situate within its jurisdiction I think its jurisdiction would be recognized by any foreign Court which applies the ordinary rules of international law. For these reasons and for the reasons given by my brothers I think the appeal should be allowed and the order should be made absolute.

Appeal allowed.

Solicitors for appellants: *Slaughter & May.*

Solicitors for respondents: *Coward & Hawksley, Sons & Chance.*

Solicitors for National Provincial and Union Bank of England: *Wilde, Moore, Wigston & Sapte.*

W. H. G.

J. L. LYONS AND COMPANY, LIMITED *v.* MAY AND BAKER, LIMITED.

1923
March 9.

[1922. J. 3077.]

Sale of Goods—Rejection by Buyer after Payment of Price—Right of Buyer to retain Goods until Return of Money paid—Document of Title—Delivery Order—Letter from Solicitor to Client—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *ss.* 38, 39—*Factors Act,* 1889 (52 *&* 53 *Vict. c.* 45), *s.* 1, *sub-s.* 4.

A person who has purchased goods and has rejected them after paying the price is not in the position of an unpaid vendor under ss. 38 and 39 of the Sale of Goods Act, 1893, and therefore has no lien upon the goods and is not entitled to retain possession of them until the money paid has been returned.

Action tried before Shearman J.

The plaintiffs on June 8, 1922, sold to one Poulot sixteen kegs of citric acid crystals B.P. white crystals, ex wharf London, cash against delivery order, and were paid by Poulot 195*l.* 1*s.* 4*d.*, the price of the same. Poulot on June 13 resold

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the crystals to the defendants by a contract in identical terms, but at a slightly higher price—namely, 202*l.* 3*s.* 3*d.*—and on June 15 he received a cheque from the defendants for that amount. The crystals were delivered by the plaintiffs to Poulot and by Poulot to the defendants, and the defendants on June 17 claimed to reject them on the ground that they were not of the quality and description contracted for. Poulot passed that rejection on to plaintiffs, and also claimed to reject the crystals. On June 29 the defendants issued a writ against Poulot for the repayment of 202*l.* 3*s.* 3*d.*, as money paid for a consideration which had wholly failed. The plaintiffs, on June 29, informed Poulot that they would take the goods back and return the cheque against a delivery order for the goods. Poulot then informed the defendants that he was prepared to take the goods back and return their cheque. He had an interview with the defendants' solicitors on July 4, when the solicitors demanded payment in cash, but Poulot said he could not do so and that the solicitors would have to take a cheque. The solicitors then demanded an open cheque, and Poulot thereupon gave the solicitors an open cheque for 202*l.* 3*s.* 3*d.* and another cheque for 6*l.* 6*s.* in respect of the costs of the writ. Before handing over the cheques Poulot, however, insisted that he should be given a delivery order for the goods. The defendants' solicitors thereupon handed to Poulot a document addressed to the defendants and signed by themselves, which was in the following terms: "Yourselves and A. I. Poulot. Mr. Poulot has to-day handed to us cheques for 202*l.* 3*s.* 3*d.* and 6*l.* 6*s.* costs. Please, therefore, let him have the 16 kegs acid citric crystals." This document was handed to the plaintiffs by Poulot duly indorsed, whereupon they gave Poulot a cheque for 201*l.* 7*s.* 4*d.*, being 195*l.* 1*s.* 4*d.* the invoice price of the goods plus 6*l.* 6*s.* the costs of the writ against Poulot, and this cheque was duly met. The two cheques which Poulot gave the defendants' solicitors on July 4 were immediately presented and dishonoured. They were re-presented on the following day, when the cheque for 6*l.* 6*s.* was duly met, but the other cheque was again

dishonoured. On July 27 a receiving order was made against Poulot. On July 21 the plaintiffs presented the document they had received from Poulot and demanded the goods from the defendants, but the defendants refused to hand over the goods, as Poulot's cheque had been dishonoured, and they claimed the right to retain possession of the goods or to have a lien upon the same against the plaintiffs until they had been paid 202*l.* 3*s.* 3*d.*

The plaintiffs thereupon brought this action, in which they claimed a declaration that the goods were their property; they also claimed the return of the goods or 195*l.* 1*s.* 4*d.* their value.

Claughton Scott K.C. and *Werninck* for the plaintiffs. After the defendants rejected the goods and the plaintiffs accepted the rejection the goods were the plaintiffs' property. Either the property in the goods never passed to the defendants, or if it had passed it revested in the plaintiffs upon the defendants' rejection and the plaintiffs are therefore entitled to the goods. The defendants might have a right of action against Poulot for the return of the money they had paid, but they have no lien upon the goods for that money. They are not in the position of unpaid vendors. They cannot reject the goods and at the same time say that they will not allow the vendors to have their goods back. There is no decision in which it has ever been held that a lien in such a state of circumstances exists.

Merriman K.C. and *N. L. Macaskie* for the defendants. A buyer who has rejected goods after paying the price is entitled to retain possession of the goods until the money paid has been returned. He is in a position analogous to an "unpaid seller." The term "seller" by s. 38, sub-s. 2, of the Sale of Goods Act, 1893, includes "any person who is in the position of a seller." Lord President Inglis stated the rule of law in *M'Cormick* v. *Rittmeyer* (1) as follows: "When a purchaser receives delivery of goods as in fulfilment of a contract of sale, and thereafter finds that the goods are not

(1) (1869) 7 Mac. 894, 897.

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conform to order, his only remedy is to reject the goods and rescind the contract. If he has paid the price, his claim is for repayment of the price, tendering redelivery of the goods. If he has granted bill for the price, his claim is for redelivery of the bill in return for the offered redelivery of the goods." The law as to sale of goods is only part of the general law of contract. In *Whitbread & Co.* v. *Watt* (1) a purchaser of real estate was held to have a lien on the property for his deposit when the contract for purchase was determined by the purchaser exercising a power of rescinding which was reserved to him by the contract itself. The document indorsed by Poulot to the plaintiffs is not a document of title within s. 1, sub-s. 4, of the Factors Act, 1889. The document was addressed by solicitors to their own clients. That is not a delivery order; it was not given by a mercantile agent. A delivery order is a document given by a seller to a buyer and addressed to a third party.

SHEARMAN J. In my opinion this action is well founded. It is quite clear that on the rejection of the crystals by the defendants and also by Poulot and the acceptance by the plaintiffs of the rejections the property in those goods revested in the plaintiffs, apart altogether from the document given by the defendants' solicitors. Therefore the plaintiffs had a right to demand possession of the goods from the defendants, and having made the demand for the possession of their own goods and that possession having been refused by the defendants, their right to bring an action for conversion arose. It has been contended that a buyer who has rejected goods which he has paid for, and who has not been repaid the money which he has paid, has a right to retain possession of the goods until he has received his money back, in the same way as a vendor, who has received a cheque as a conditional payment, but which has been dishonoured, has a right to stop the goods in transitu, or, if he is in possession of the goods, to a lien on them for the price. I however cannot find that there is any foundation for such a right at

(1) [1902] 1 Ch. 835.

common law. There is certainly no such right under the Sale of Goods Act, 1893, unless I am prepared to hold, and I am not going to make new law, that a person in the same position as the defendants comes within s. 38 of the Sale of Goods Act, 1893, which, after defining an unpaid seller, includes within the term "seller" "any person who is in the position of a seller, as, for instance, an agent of the seller." I am unable to say that a person who has bought and paid for and afterwards rejected goods is a person like an unpaid seller. Neither am I impressed by what I consider the entirely false analogy with regard to the lien of a purchaser for a deposit on the sale of real property, because a deposit paid on the sale of real property is a thing sui generis. In my opinion the document which was given by the defendants' solicitors to Poulot comes within the definition of a document of title in s. 1, sub-s. 4, of the Factors Act, 1889; it was asked for as a document of title, and when given was intended as such. I also think, without basing my judgment upon the point, that the plaintiffs would be entitled to succeed on an estoppel, as the document was given to Poulot with the intention that he should act upon it and get his money back from the plaintiffs. The plaintiffs paid money on the faith of that document, and would be entitled to recover back from the defendants the money so paid. The plaintiffs are, therefore, entitled to judgment for 195*l.* 1*s.* 4*d.*

Judgment for plaintiffs.

Solicitors for plaintiffs: *Cubison & Christie.*
Solicitors for defendants: *Reynolds & Son.*

R. F. S.

1923
Feb. 7.

PINNOCK BROTHERS *v.* LEWIS AND PEAT, LIMITED.

[1922. P. 2972.]

Sale of Goods—Arbitration Clause—Notice of Arbitration to be given within specified Time—Inability to comply within Time specified—Award—"Defect" in Goods—Damages.

The plaintiffs bought from the defendants a quantity of East African copra cake to be of fair average quality, sound delivered. The contract provided that "the goods are not warranted free from defect rendering same unmerchantable, which would not be apparent on reasonable examination"; that any disputes arising out of the contract should be settled by arbitration; and that notice of arbitration should be given and the arbitrator nominated in writing not later than fourteen days after the final discharge of the vessel. The plaintiffs resold the copra cake to B. & Co., who resold it to dealers, and they in turn resold it to farmers, who used it for feeding cattle. The cattle fed on the cake became ill, and it was then found, on analysis, that the cake contained an admixture of castor beans in so large a proportion as to make it poisonous. Claims were then made by the various buyers against their sellers and by the plaintiffs against the defendants as soon as the mischief was discovered, but this was after the expiration of fourteen days from the final discharge of the vessel. The plaintiffs claimed arbitration, but the arbitrator before whom the matter came held that he had no jurisdiction, as notice of arbitration was not given nor the arbitrator nominated in time. In an action by the plaintiffs claiming damages, it was found that it was within the contemplation of the parties that the copra cake would be used for cattle food and nothing else:—

Held, (1.) that the presence of the arbitration clause was not in itself a bar to the action, nor was the award, which dealt merely with the arbitrator's jurisdiction and not with the claim; (2.) that the clause as to defects in the goods did not protect the defendants inasmuch as the copra cake mixed with castor beans could not properly be described as copra cake; and (3.) that the plaintiffs were entitled to recover the damages and costs they had had to pay to their purchasers.

Pompe v. *Fuchs* (1876) 34 L. T. 800; *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus & Co.* [1922] 2 A. C. 250; *Ayscough* v. *Sheed, Thomson & Co.* (1923) 39 Times L. R. 206; and *Bostock & Co.* v. *Nicholson & Sons* [1904] 1 K. B. 725 distinguished.

ACTION tried by Roche J. as a commercial cause.

The plaintiffs claimed damages for breach of contract in the sale of East African copra cake.

By a contract in writing headed "London Cattle Food Trade Association," dated July 5, 1921, the plaintiffs bought from the defendants 100 bags of East African copra cake at 7*l.*

per ton c.i.f., fair average quality, sound delivered, net cash in London against shipping documents on arrival of steamer. The contract contained (inter alia) the following provisions :—

(*a*) "Latent defect. The goods are not warranted free from defect rendering same unmerchantable which would not be apparent on reasonable examination, any statute or rule of law to the contrary notwithstanding."

(*b*) "Any disputes arising out of this contract shall be settled by arbitration in London, each party to the contract appointing one arbitrator."

(*c*) "Notice of arbitration to be given and arbitrator nominated in writing by the last buyer claiming arbitration as follows :—

(1.) "In respect to disputes in connection with the quality or condition of goods sold for shipment and delivered not later than fourteen working days after final discharge of vessel or vessels declared against the contract.

(2.) "In respect to disputes in connection with the quality or condition of goods sold otherwise than for shipment within fourteen days from date of delivery.

(3.) "In respect to any dispute other than provided for above, within fourteen days of the dispute having arisen."

The vessel bringing the copra cake was discharged on July 7, 1921, and on July 13 the plaintiffs resold the cake to J. H. Brantom & Co., who thereafter manufactured part of it into cakettes and dairy meal, some of which were sold by them to their customers to be used for feeding cattle. Messrs. Brantom also resold part of the copra cake in the same form as it was delivered to them. When, either in its manufactured or unmanufactured form, the copra cake was used by the various farmers to whom it was ultimately sold it caused serious illness to their cattle, and it was then found on analysis that it contained an admixture of castor beans in so large a proportion as to make it poisonous. The various purchasers returned the unused quantities of the cake and

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claimed damages against the dealers from whom they bought it; the dealers, in turn, returned it with their claims to Messrs. Brantom who, again, claimed against the plaintiffs, and the plaintiffs claimed against the defendants. That dispute arose about October 31, 1921, but no notice of arbitration was given or an arbitrator nominated within the period laid down by the contract. On September 27, 1922, however, the plaintiffs claimed arbitration. The defendants objected that the claim was out of time and the umpire, before whom the matter came, by his award dated November 3, 1922, said: "I have no jurisdiction to arbitrate on this claim because notice of arbitration was not given nor the arbitrator nominated within fourteen clear days after final discharge of the vessel declared against the contract." Thereafter—namely, on November 13, 1922, the plaintiffs issued the writ in this action claiming (1.) the price of the goods and the damages they had had to pay to Messrs. Brantom—these two sums being now agreed to at 550*l.*—and (2.) 35*l.* 14*s.*, the costs of the proceedings against them by Messrs. Brantom, as damages which they had sustained by reason of the defendants' breach of contract and/or of warranty. The plaintiffs also relied on s. 1, sub-ss. 3 and 4, of the Fertilisers and Feeding Stuffs Act, 1906, by which, as they contended, the defendants warranted that the copra cake was suitable to be used as food for cattle.

The defendants pleaded that the plaintiffs' claim was out of time and was therefore not sustainable and/or was barred or had been waived; and, further, the defendants denied that the goods were sold to be used as cattle food. They further said that if the goods were unmerchantable they were rendered so by a defect not apparent on a reasonable examination and they, the defendants, were therefore under no liability in respect thereof. As to damages, they said that those claimed were too remote.

Roche J. found as facts: (1.) that the dispute between the plaintiffs and the defendants began about the end of October, 1921, and that it could not have been begun before then because the serious admixture of castor beans with the

copra cake in question had not been discovered till about that time by the farmers and others who used it for feeding their cattle ; (2.) that the copra cake containing an admixture of castor beans in the proportion present in this instance could not properly be described as copra cake at all ; (3.) that the matter of complaint with regard to the copra cake could not have been discovered by the plaintiffs or any of the sub-purchasers by merely looking at it ; (4.) that it was within the contemplation of the parties that the copra cake would be used for cattle food and nothing else ; and (5.) that the mischief was discovered and communicated to the defendants as soon as it reasonably could have been.

Bevan K.C. and *Le Quesne* for the plaintiffs.

Jowitt K.C. and *Somervell* for the defendants. It was a condition precedent to the plaintiffs' right to make any claim that notice of arbitration should be given and an arbitrator nominated not later than fourteen working days after the final discharge of the vessel. This clause was not complied with by the plaintiffs, whose action is therefore barred : *Pompe* v. *Fuchs* (1) ; *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus & Co.* (2) ; *Ayscough* v. *Sheed, Thomson & Co.* (3) The plaintiffs could easily have had the copra cake analysed within the fourteen days.

Secondly, the contract exempts the defendants from liability for defects not apparent on reasonable examination. The presence of the castor beans was a defect which was not apparent on reasonable examination—that is, by looking at the goods. The defendants are therefore protected by this clause.

Thirdly, in any event the damages claimed are too remote. The cake passed through the hands of a string of buyers, and although the defendants might conceivably be liable to their immediate purchasers, they cannot be liable to buyers far down the string : *Bostock & Co.* v. *Nicholson & Sons.* (4) The damages claimed were not within the contemplation

(1) 34 L. T. 800.
(2) [1922] 2 A. C. 250.
(3) 39 Times L. R. 206.
(4) [1904] 1 K. B. 725.

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of the parties; and the loss would not have occurred had the plaintiffs examined the goods.

Bevan K.C. in reply. The mere presence of an arbitration clause in a contract is no bar to an action. Here there is nothing to indicate that an award shall be a condition precedent to an action, or that no action can be brought. The award did not deal with the merits of the plaintiffs' claim.

[He was not called upon to deal with the effect of the latent defect clause.]

As to damages: the plaintiffs are entitled to those claimed: *Agius* v. *Great Western Colliery Co.* (1), following *Hammond & Co.* v. *Bussey.* (2) In *Agius's Case* (1) the plaintiff having contracted with shipowners for a supply of coal to their steamers, entered into a contract with the defendants for the supply to him of coal which was expressly stated to be for shipment in those steamers. The defendants committed a breach of their contract in not supplying the coal with reasonable dispatch, and in consequence of this one of the steamers was delayed and the shipowners sued the plaintiff to recover 150*l.* in respect of her detention. The plaintiff gave notice of the claim and action to the defendants, who repudiated liability. The plaintiff defended the action, paying 20*l.* into Court, and at the trial he succeeded in showing that that sum was sufficient. He then sued the defendants and was held entitled to recover not only the 20*l.* paid to the shipowners but also as damages, under the rule in *Hadley* v. *Baxendale* (3), the costs reasonably incurred in defending the action against him over and above the amount received by him as party and party costs in that action. [He was stopped.]

ROCHE J. In this case the plaintiffs claim damages for breach of contract by the defendants in connection with the sale by the defendants to the plaintiffs of 100 bags of East African copra cake at 7*l.* per ton. Each bag weighs about 1 cwt. and the price was no more than 37*l.* 6*s.*, but

(1) [1899] 1 Q. B. 413. (2) (1887) 20 Q. B. D. 79.
(3) (1854) 9 Ex. 341.

through the breach of contract damages have been suffered and are claimed to an extent largely exceeding the price of the copra cake. [His Lordship stated the facts and continued:] The first defence is based on the existence in the contract of an arbitration clause and upon an award made in consequence of that clause. In view of that clause and the award it is said by the defendants that the claim is not sustainable or that the plaintiffs must be held to have waived it; and in support of this contention several cases have been cited. The most recent of these is *Ayscough* v. *Sheed, Thomson & Co.* (1) In that case the arbitrator decided—whether rightly or wrongly is immaterial for the present purpose—that by reason of a clause as to time contained in the contract, the plaintiffs had no claim, and therefore he dismissed it. In the present case the arbitrator merely decided that he had no jurisdiction, and that being so the award does not and cannot determine the substance of the plaintiff's claim. *Ayscough's Case* (1) is therefore distinguishable. *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus & Co.* (2) was also relied upon by the defendants. So far as material, the difference between that case and this is that there the contract in terms said that "any claim must be made in writing and claimants' arbitrator appointed within three months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred," whereas in the present contract there is no such express provision, and I cannot imply one. That case therefore does not apply. In view of that, it is unnecessary to decide, although, as it was discussed in argument, I may mention the point, whether, even if there were such a clause in this contract, it would have afforded any defence having regard to the fact that the goods delivered did not comply with the contract but were totally different from what was contracted for; and I should further have to consider whether the application of the arbitration clause and the clause as to time would not have to be limited to disputes capable of arising,

(1) 39 Times L. R. 206. (2) [1922] 2 A. C. 250.

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and of being brought forward, within the period mentioned. A third case—*Pompe* v. *Fuchs* (1)—was very strongly relied upon by the defendants. The report is very short; and it would seem that the judgment, which in effect was that the holding of an arbitration was either a condition precedent to an action, or was the sole remedy provided for a certain breach of contract, was based upon terms in the contract which are not set out in the reported statement of facts. Forming the best judgment I can in view of that condition of the report, I can find no terms in the present contract parallel to those relied upon by Cockburn C.J., and accordingly that case is not an authority which assists me in the decision of this case. As it is not covered by authority, I now have to consider the point on principle. In my view, Mr. Bevan is correct when he says that the presence of an arbitration clause in a contract is not in itself a bar to an action or a condition precedent to a right of action. It may be a ground for applying for a stay, but it is not even a ground upon which the Court is bound to grant a stay. The mere presence of an arbitration clause is no defence to an action on the contract. An award following on the arbitration clause may be an answer to the claim, and it will be an answer where it deals with the claim. *Ayscough's Case* (2) is an authority for that. But where, as in this case, the award does not deal with the claim but merely with the jurisdiction of the arbitrator, it is no answer. Accordingly, I hold that the defence relied upon under the arbitration clause and as to the period of limitation thereunder affords no defence to the plaintiffs' claim.

The next defence raised was based on the clause of the contract which provides that "the goods are not warranted free from defect rendering same unmerchantable which would not be apparent on reasonable examination, any statute or rule of law to the contrary notwithstanding." In my view, where a substance quite different from that contracted for has been delivered, that clause has no application, as such a difference of substance cannot be said to constitute

(1) 34 L. T. 800. (2) 39 Times L. R. 207.

a "defect." It was said for the defendants that the admixture of castor beans with copra cake was so common that the presence of the castor beans could not be regarded as otherwise than a "defect." Upon the facts I am against this contention, and I hold that the delivery in this case could not be properly described as copra cake at all. That is sufficient to dispose of the defendants' contention, and it is therefore unnecessary to decide whether if there was a defect it was latent. If it were necessary to decide the point I should hold that the defect was not latent, for, in my opinion, that word is only applicable to such a defect as is not discoverable by the exercise of reasonable care. I think this defect, if it could be so called, could have been discovered by the exercise of reasonable care. Who should exercise it is another matter. It was said that a defect is latent if it cannot be discovered by reasonable examination and that reasonable examination means inspection by the eye. I see no reason for attaching so limited a meaning to the words "reasonable examination," and no reason for excluding analysis or microscopic examination by which the presence of foreign matter could have been discovered. This defence therefore fails likewise.

As to damages, it is said that those claimed are too remote, that there is a string of buyers and sellers, and that these damages were not within the contemplation of the parties. Reliance was placed on *Bostock & Co.* v. *Nicholson & Sons* (1), but in view of my findings of fact that it was within the contemplation of the parties that this copra cake should be used in one or other of the two ways mentioned for cattle food and nothing else, and that the mischief was discovered and communicated as soon as it reasonably could have been, *Bostock & Co.* v. *Nicholson & Sons* (1) is not applicable. The damages claimed follow from the principle laid down in *Hadley* v. *Baxendale* (2); *Randall* v. *Raper* (3); *Hammond & Co.* v. *Bussey* (4); and *Agius* v. *Great Western Colliery Co.* (5) The principle laid down in those cases covers

(1) [1904] 1 K. B. 725. (2) 9 Ex. 341. (3) (1858) E. B. & E. 84.
(4) 20 Q. B. D. 79. (5) [1899] 1 Q. B. 413.

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and includes the costs which the plaintiffs had to pay to their buyers, Messrs. Brantom. It was further said for the defendants that the chain of causal connection between the damage and their breach of contract was broken because the defect complained of was not merely discoverable by the plaintiffs or by some one dealing with the goods before the damage was done to the cattle and indeed before the goods were manufactured in combination with other materials, but should have been discovered by the exercise of reasonable care. As to that I hold that, except by an expert analyst or some one more conversant with those goods than any of the persons employed by the plaintiffs or by Messrs. Brantom, the matter of complaint was not discoverable by the exercise of reasonable care by looking at the goods. I further hold that in dealing with a small parcel like this the plaintiffs or their sub-buyers could not be expected to undertake an analysis, as the small profits available would be entirely exhausted if resort were had to a public analyst. The buyers were entitled, if they chose, without being guilty of negligence or unreasonable conduct, to rely on their contract with the sellers rather than to rely on any precautions of their own. In those circumstances there was no break between the damage suffered and the cause of complaint or breach of contract. It is unnecessary for me to determine who, if any one, ought to have analysed the goods, but I only say that if any one should have done so it was the person who first put the goods on the market on behalf of the foreign vendor. It is further said by the defendants that the damages are not recoverable because the plaintiffs were not, on their contract, liable to Messrs. Brantom, because that contract contained the words "Not accountable for weight, measure or condition" and "The sale is on the terms that there is no implied condition that the goods are free from latent defects." I hold that the cause of complaint—namely, the presence of the castor beans, is not a matter which can properly be described as condition. It is failure of the goods to comply with the description; it is a delivery of goods other than those contracted to be

delivered; and it is, further, a breach of the provisions of the Fertilisers and Feeding Stuffs Act, 1906. My decision as to the term that there is no implied condition that the goods are free from latent defect follows on my decision as to the word "defect" and the word "latent" in the contract between the plaintiffs and the defendants.

For these reasons the defence fails on all points and there will be judgment for the plaintiffs for 585*l.* 14*s.*

Judgment for plaintiffs.

Solicitors for plaintiffs: *Gasquet, Metcalfe & Walton.*

Solicitors for defendants: *Coward & Hawksley, Sons & Chance.*

J. S. H.

SCHAVERIEN *v.* CORBETT.

1923
March 2.

[1923. S. 136.]

Money-lender—Registration—Cancellation—Letter from Money-lender expressing Desire to cancel—Attachment of Letter to Register—Money-lenders Act, 1900 (63 *&* 64 *Vict. c.* 51), *s.* 2.

Where a registered money-lender, during the currency of the period for which he is registered, writes to the official in charge of the register a letter requesting that his registration shall be cancelled, the annexation by the official of the letter to the register so as to be seen by any person inspecting it has not the effect of cancelling the registration.

Quaere, whether there is any power under the Money-lenders Act, 1900, or otherwise, to cancel a subsisting registration.

ACTION tried by Salter J. as a short cause under Order XIV., r. 8.

The plaintiff, Lewis Schaverien, had carried on business as a registered money-lender under the Money-lenders Acts, 1900 and 1911, and in March, 1921, his registration had been renewed. On October 26, 1921, the plaintiff wrote to the office for registration of money-lenders at Somerset House, London, a letter in the following terms: "I shall be obliged

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if you will cancel my registration for money-lending at all addresses. I am giving up business." On October 28, 1921, the Controller of Stamps, in whose department the said office was comprised, replied as follows: "I have to acknowledge receipt of your letter of 26th inst. and to inform you that there is no provision under the above-named Acts for the cancellation of a registration made in pursuance thereof. Your letter has, however, been attached to your last return for the information of any persons searching the Register." The plaintiff thereupon continued to carry on business as a money-lender, and he advanced money to the defendant, Howard Corbett, on two promissory notes respectively dated March 1 and April 25, 1922, payable on April 1 and May 25, 1922, and made by the defendant payable to the plaintiff for sums of 1060*l.* and 265*l.*, and interest thereon. The defendant made default in payment of these promissory notes.

On January 8, 1923, the plaintiff brought the present action against the defendant on a specially indorsed writ claiming the above sums and interest as being due to him as payee and holder of the said promissory notes.

The plaintiff having taken out a summons for leave to sign final judgment, the defendant made an affidavit in opposition thereto, in which he stated that the plaintiff had written the above-mentioned letter to Somerset House requesting that his registration should be cancelled, that on February 7, 1923, the defendant had searched at Somerset House, where the said letter had been produced to him, and there was no subsequent registration of the plaintiff after the date of that letter, and that the plaintiff, therefore, was not registered according to the Acts (1) at the date of the

(1) The Money-lenders Act, 1900, provides:—

Sect. 2: "(1.) A money-lender defined by this Act—

"(*a*) shall register himself as a money-lender in accordance with regulations under this Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lender; and

"(*b*) shall carry on the money-lending business in his registered name, and in no other

transactions in question. On February 8, 1923, the Master made an order giving the defendant leave to defend, but requiring him to give particulars of any defence not disclosed in his affidavit. The defendant then gave notice that he would rely on the following defences: that the plaintiff was not at the date of the said transactions duly registered as a money-lender with the addresses at which he then carried on business; that the plaintiff was at all material times carrying on the business of a money-lender, but not in his registered name or at his registered address; and that the said promissory notes were given to the plaintiff otherwise than in his registered name.

At the trial evidence was given by the officer in charge of the register of money-lenders to the effect that the plaintiff was duly registered as a money-lender, that the above-mentioned letters had passed between the plaintiff and the office, and that the plaintiff's letter had in fact been attached to his last return of the particulars required by the Act.

J. B. Matthews K.C. and *R. F. Levy* for the plaintiff. The plaintiff's registration as a money-lender was renewed in March, 1921, and therefore under s. 3, sub-s. 2, of the Money-lenders Act, 1900 (1), it would have effect for three years from that time. Neither the Money-lenders Acts nor the Regulations thereunder contain any provision for the cancellation of the registration of a money-lender during the period

name and under no other description, and at his registered address or addresses, and at no other address; . . . ."

"(2.) If a money-lender fails to register himself as required by this Act, or carries on business otherwise than in his registered name, ... or elsewhere than at his registered address . . . . he shall be liable . . . . to a fine. . . . ."

Sect. 3: "(1.) The Commissioners of Inland Revenue, subject to the approval of the Treasury, may make regulations respecting the registration of money-lenders, ... , the form of the register, and the particulars to be entered therein, and the fees. . . . .

"(2.) The registration shall cease to have effect at the expiration of three years from the date of the registration, but may be renewed from time to time, and if renewed shall have effect for three years from the date of the renewal."

(1) See note (1) ante, p. 700.

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SCHAVERIEN v. CORBETT.

for which it has been effected. The plaintiff's registration was not cancelled by his letter to the office or by the annexation of that letter to the register. The plaintiff was therefore a duly registered money-lender at the time of the transactions in question.

J. A. Compston K.C. and *E. Austin Farleigh* for the defendant. The Act of 1900, s. 2 (1), provides that a money-lender "shall register himself as a money-lender," and it must therefore be presumed that it gives him, if not expressly at least by implication, a corresponding power of himself cancelling his registration. It would be unreasonable that a money-lender who desired to cancel his registration during the period for which it was effected should have no power of doing so. The annexation of the plaintiff's letter to the register was an effective cancellation of his registration.

SALTER J. The question is whether or not, at the time of the transactions between the parties in March and April, 1922, the plaintiff was registered as a money-lender under the Money-lenders Acts. It seems clear that the answer to that question should be in the affirmative. The plaintiff's registration had been renewed in March, 1921, and it would therefore presumably have effect for the period of three years from that time. In October, 1921, the plaintiff wrote to the registration office expressing a desire to have his name removed from the register. The Controller replied informing him, rightly or wrongly, that there was no machinery under the Acts for that purpose. The officials, however, annexed the plaintiff's letter to his last return under the Acts, so that any one searching the register could see that he had expressed the intention of ceasing to be registered. The question is whether in these circumstances the plaintiff was registered as a money-lender when his transactions with the defendant took place. In my opinion he was registered as a money-lender at that time.

(1) See note (1) ante, p. 700.

[His Lordship held that the other defences raised also failed and that the plaintiff was entitled to succeed in the action.]

Judgment for plaintiff.

Solicitors for plaintiff: *Isadore Goldman & Son.*

Solicitors for defendant: *Leoni & Deards, for E. E. C. Cooper, Bourne End, Bucks.*

J. R.

END OF VOL. I.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1923, will be as follows :—

In the First Series,
[1923] 1 Ch. [1923] 2 Ch.

In the Second Series,
[1923] 1 K. B. [1923] 2 K. B. [1923] P.

In the Third Series,
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PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

PRINTED BY W SPEAIGHT & SONS, LTD, 98-99, FETTER LANE, LONDON, E.C. 4.

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